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IN THE

Supreme Court of the United States

October Term, 1955.

No. .....

PACIFIC WESTERN OIL CORPORATION, a corporation, Successor in Interest to George F. Getty, Inc.,

Appellant,

vs.

FRANCHISE TAX BOARD, State of California,

Appellee.

Appeal From the District Court of Appeal of the State of California.

STATEMENT AS TO JURISDICTION.

Appellant, Pacific Western Oil Corporation, a corporation, as Successor in Interest to George F. Getty, Inc., submits herewith its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the District Court of Appeal of the State of California in cause number Third Civil 8521.

The Opinion Below.

The opinion of the District Court of Appeal of the State of California is reported in 136 California Appellate Reports, Second Series, 794. A copy of the opinion is attached hereto as Appendix A. A copy of the judgment

of the Superior Court is attached hereto as Appendix B. A copy of the memorandum opinion of the Superior Court is attached hereto as Appendix C.

Jurisdiction.

1. This is an appeal from the decision of the District Court of Appeal of the State of California, affirming the judgment of the Superior Court of the State of California in and for the County of Sacramento, in favor of Appellee, Franchise Tax Board. The action was brought by Appellant to recover franchise taxes paid to Appellee under protest. The taxes so paid total $178,952.82.

2. The District Court of Appeal entered its decision on November 8, 1955. Appellant's petition for rehearing was denied December 2, 1955, and Appellant's petition for hearing in the Supreme Court of the State of California was denied December 28, 1955. The Notice of Appeal to this Court was filed by Appellant with the Clerk of the District Court of Appeal on March 23, 1956.

3. The jurisdiction of this Court on appeal is conferred by 28 U. S. C. A., Section 1257(2). Appellant challenges the validity of the judgment of the District Court of Appeal on the grounds that Section 10 of the California Bank and Franchise Tax Act, as applied by that Court to the activities of Appellant's predecessor, is repugnant to the Constitution of the United States. The decision of the District Court of Appeal was in favor of its validity.

4. Cases believed to sustain the jurisdiction of this Court on appeal include *Western Union Telegraph Co. v. Kansas,* 216 U. S. 1, 54 L. ed. 355, 30 S. Ct. 190; *Pullman Company v. Kansas,* 216 U. S. 56, 54 L. ed. 378, 30 S. Ct. 232; *International Paper Co. v. Massa-*

chusetts, 246 U. S. 135, 62 L. ed. 624, 38 S. Ct. 292; *First Bank Stock Corp. v. Minnesota,* 301 U. S. 234, 81 L. ed. 1061, 57 S. Ct. 677; *Wheeling Steel Corp. v. Fox,* 298 U. S. 193, 80 L. ed. 1143, 56 S. Ct. 773; *Edwards v. Chile Copper Co.,* 270 U. S. 452, 70 L. ed. 678, 46 S. Ct. 345.

5. The California Bank and Franchise Tax Act for the years applicable to this appeal is officially reported as statutes of 1929, page 19, as amended and is contained in Deering's California General Laws, Act 8488.

Section 10 of that Statute, which is here in issue, provided, during the years here applicable and prior to its amendment effective July 22, 1939, as follows:

> "Sec. 10. If the entire business of the bank or corporation is done within this State, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this State, the tax shall be according to or measured by that portion thereof which is derived from business done within this State. The portion of net income derived from business done within this State, shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value, and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State and to avoid subjecting the taxpayer to double taxation.
>
> "If the commissioner reallocates net income upon his examination of any return, he shall, upon the written request of the taxpayer, disclose to him the basis upon which his reallocation has been made."

Questions Presented.

1. Whether the Franchise Tax Board of the State of California has the power and authority, consistently with the commerce clause of the Constitution of the United States (Article I, Section 8, Clause 3), to levy a franchise tax upon Appellant's predecessor, a Delaware corporation engaged in interstate commerce, which tax was measured by income from intangible personal property not reasonably related to local activities conducted by such corporation within California.

2. Whether Appellant's predecessor, a Delaware corporation doing business in California, may be required consistently with the due process clause of the Fourteenth Amendment of the Constitution of the United States to pay a franchise tax imposed by the State of California upon income in the nature of interest, dividends and profits from sales received by Appellant from its intangible personal property, which income was not reasonably related to activities conducted by such corporation within California.

3. Whether the income from intangible personal property owned by Appellant's predecessor, a Delaware corporation, is subject to taxation within the territorial jurisdiction of the Franchise Tax Board of the State of California, consistently with the Fourteenth Amendment of the Constitution of the United States, when such income and such intangible personal property was not an integral part of any California business activities of such corporation.

4. Whether the imposition of franchise taxes by the State of California upon Appellant's predecessor, a Delaware corporation engaged in interstate commerce, which tax was measured by income paid and received outside of

the State of California from intangible personal property the physical evidences of which were located outside the State of Califorina and by income not reasonably related to local activities conducted by Appellant's predecessor within California, constituted an undue burden upon interstate commerce, in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

5. Whether the franchise taxes imposed by the State of California upon Appellant's predecessor, a Delaware corporation, which tax was measured by income paid and received outside the State of California from intangible personal property, the physical evidences of which were located outside the State of California and by income not reasonably related to local activities conducted by Appellant's predecessor within California, deprived Appellant's predecessor and Appellant of property without due process of law and denied Appellant's predecessor of the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States.

6. Whether Section 10 of the California Bank and Corporation Franchise Act, insofar as it is interpreted by the courts of the State of California to require Appellant's predecessor, a Delaware corporation engaged in interstate commerce, to pay a franchise tax, measured by income paid and received outside the State of California from intangible personal property, the physical evidences of which were located outside the State of California and by income not reasonably related to local activities conducted by Appellant's predecessor in California, imposes an undue burden upon interstate commerce contrary to Article I, Section 8, Clause 3 of the Constitution of the United States and is therefore unconstitutional and invalid.

7. Whether Section 10 of the California Bank and Corporation Franchise Act, insofar as it is interpreted by the courts of the State of California to require Appellant's predecessor, a Delaware corporation, to pay a franchise tax measured by income paid and received outside the State of California from intangible personal property, the physical evidences of which were located outside the State of California and by income not reasonably related to local activities conducted by Appellant's predecessor in California, deprives Appellant's predecessor and Appellant of their property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States and is therefore unconstitutional and invalid.

Statement of the Case.

I. The Nature of the Activities of Appellant's Predecessor.

Appellant is the Successor in Interest to George F. Getty, Inc., the taxpayer involved in this appeal. Pacific Western Oil Corporation succeeded by merger to the assets and liabilities of George F. Getty, Inc., a Delaware corporation, on May 31, 1946. The income taxed by Appellee includes income of George F. Getty, Inc. (hereinafter referred to as the taxpayer), and also income from Getty, Inc., a Delaware corporation, which was merged into George F. Getty, Inc. on August 31, 1937.

Upon its incorporation the taxpayer's principal office and executive headquarters were established at 15 Exchange Place, Jersey City, New Jersey. At no time from

the date of its incorporation in December, 1936, through the years in question here did the taxpayer maintain its principal executive office elsewhere than in New Jersey. It maintained a branch office in Los Angeles in order to supervise California oil production properties, and branch offices in Fort Worth, Texas, and Carlsbad, New Mexico, for the purpose of supervising oil drilling operations in New Mexico, Louisiana, Kansas and Texas.

Both the taxpayer and predecessor corporations, from which it received assets and assumed liabilities, were companies in which the capital stock was owned by J. Paul Getty, either in his own name or as trustee. During the period here in question Mr. Getty lived in a penthouse in New York City and used the corporate offices in Jersey City, New Jersey, as the place from which he influenced corporation operations.[1] All the directors, the President and the Secretary-Treasurer, resided outside of California, and all meetings of stockholders and directors were held in New Jersey.

At the time of the merger of the taxpayer with Getty, Inc., on August 31, 1937, the assets of the taxpayer were valued. This valuation showed $23,166,232.04 as the value of the investment securities and $5,500,000.00 as the value of the oil-producing properties. As the result of the merger with Getty, Inc., on August 31, 1937, the taxpayer acquired additional investments valued at $5,133,908.16 and additional oil-producing properties valued

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[1]Mr. Getty continued to maintain his legal domicile in California, although he did not live there and spent very little time there during this period.

at $237,099.91. Approximately 60% of the oil-production properties were located in California; the remainder were located in other States.

The activities of the taxpayer during the period here involved related to two separate and distinct fields of endeavor. As the owner of valuable oil-bearing lands and mineral rights, it engaged, through its branch offices, but under the direction of the executive officers in New Jersey, in the exploitation of those properties and in the sale of the oil products to companies engaged in refining and marketing. In this connection, the California office was given authority to handle the routine operation of the corporation's oil properties in California. This did not include any authority to acquire new leases, to execute contracts, or to sell oil, except "spot oil."

Operated as a division apart from its oil drilling and production division, taxpayer engaged in a separate and distinct line of business relating to stocks, bonds and other intangibles, which business was by far its most valuable and most profitable division. Taxpayer did not merely passively hold these securities as permanent investments, but actively traded in them to a very substantial extent. All dividends, interest, proceeds of sales and other revenues relating to these intangibles were received in New Jersey and deposited in bank accounts in New Jersey and New York. The California officers had no authority to draw on these bank accounts. All of the stock certificates, bonds, notes and other evidences of intangibles were held in New Jersey and New York. The California officers had no authority whatever to deal with them.

The securities, and their values on August 31, 1937, were as follows:

429,500 shares Pacific Western Oil Corporation	$10,737,500.00
404,854 shares Tide Water Associated Oil Company	8,097,080.00
1,039 shares Richfield Oil Corporation	8,701.60
645,934 shares Minnehoma Oil & Gas Company	6,414,124.62
Promissory Notes of Pacific Western Oil Corporation	2,815,257.04
German Government Bonds	168,152.50
Stock Purchase Options	44,000.00
Warrants Pacific Western Oil Corporation	9,109.15
Royalty Interests	6,307.29
Total[2]	$28,300,232.20

During the three years under consideration, the taxpayer handled, through its New Jersey office and officers, purchases, sales and loans of securities which amounted to nearly $7,000,000.00 and taxpayer's net income from dividends ($2,061,332.50), interest ($327,911.26) and capital gains ($351,078.11) totalled $2,704,321.87. By contrast, taxpayer's total net oil, gas and gasoline sales during the same period totalled less than $4,400,000.00,

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[2]The valuations listed above reflect appraised market values on August 31, 1937. References are made in the opinion of the District Court of Appeal and in the findings of the trial court to the book value of these assets. The book value of the securities on December 31, 1937, was about $10,800,000.00 and the book value of the lands, leases, mineral rights and equipment in California was about $850,000.00.

and its net income from its oil operations for the period totalled less than $650,000.00.

The activities of the taxpayer in relation to its security holdings were two-fold, those connected with acquisitions and sales of securities, and those connected with management of controlled companies.

During 1937 the taxpayer purchased warrants of Pacific Western Oil Corporation, purchased some of its own stock and acquired a promissory note payable by Pacific Western Oil Corporation in the amonut of $300,000.00. It sold in fifteen separate transactions the total of 10,600 shares of stock of Tide Water Associated Oil Company and sold 2,700 shares of stock of Pacific Western Oil Corporation in eight different transactions. Interest and dividends and profits from sales of securities during the year 1937 totaled $1,138,561.11.

In 1938, the taxpayer acquired stock and promissory notes of Pacific Western Oil Corporation, purchased 200,000 shares of Santa Fe Investment Company (for a price in excess of a quarter of a million dollars), paid $50,000.00 for stock in Getty Realty Corporation (a New York corporation organized by taxpayer to acquire and operate the Hotel Pierre in New York City), and loaned $2,310,100.00 to that company, purchased a promissory note of Pacific Western Oil Corporation for $349,115.23, and purchased pounds sterling and Dutch guilders through brokers in the amount of $153,898.98. During 1938, it also sold 30,300 shares of stock to Tide Water Associated Oil Company in twenty-four different transactions, it sold more than one thousand shares of Richfield Oil Corporation, and sold pounds sterling. The income received in 1939 from the security division of the business totalled $848,115.39.

In 1939, the taxpayer purchased 6,200 shares of Pacific Western Oil Corporation in twenty different transactions on the New York Stock Exchange. It purchased a promissory note, and it sold 2,100 shares of stock of Tide Water Associated Oil Company. The income from the security division during 1939 amounted to $630,149.97.

Each and all of the foregoing security transactions were directed by the executive officers in New Jersey and executed by brokers in New York.

The management of the taxpayer's security holdings involved far more than the purchasing, selling and receipt of income. The security holdings were the basis upon which the taxpayer conducted its efforts to exert control over other corporations. The very founding of the taxpayer with its office in New Jersey was for the purpose of carrying on the efforts by J. Paul Getty to acquire control of Tide Water Associated Oil Company. An alliance was made with other stockholders and with financial interests on Wall Street. An attempt was first made to prevent the management of Tide Water from establishing practices which would be unfavorable to the taxpayer as a stockholder. The taxpayer actively resisted the attempts by the management of Tide Water to establish staggered terms of directorship. In addition, the taxpayer, through its officers in the east, sponsored measures permitting the calling of stockholders' meetings, sponsored legislation to neutralize the voting of certain Dutch stock, attended the stockholders' meetings, circulated other stockholders, and participated in other matters for the protection of its interests in Tide Water and in the influence of its affairs. The taxpayer's interest in Tide Water stock in excess of eight million dol-

lars by its very nature required active participation by the taxpayer in the affairs of Tide Water.

Similarly, the taxpayer engaged in efforts seeking to protect and enhance its indirect investment in Skelly Oil Company, an investment valued by the management of taxpayer as being in excess of one hundred million dollars.[3] The taxpayer took an active part in the determination and the execution of the policies and the management of Skelly Oil Company.

Another corporation in which the taxpayer owned stock was Getty Realty Corporation, organized as a New York corporation in September, 1938, for the purpose of acquiring and operating the Hotel Pierre in New York City. The negotiations for the acquisition of the hotel were carried on by the management of taxpayer involving a total cost of approximately $2,350,000.00. The taxpayer actively supervised the management and determination of policy of this subsidiary corporation.

In addition to these specific activities by the taxpayer in connection with its multi-million dollar investments in other corporations, it conducted the necessary and routine activities in connection with the constant appraisal and evaluation of its security position.

Although the District Court of Appeal recited most of the above facts, or summarized them, its opinion did not attempt to resolve whether or not these many activities constituted a separate and distinct investment business, so as to make the office from which that segment of its business was conducted the commercial domicile of the

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[3]Pacific Western owned 47% of the stock of Mission Corporation, which in turn owned 59% of the stock of Skelly Oil Company. All three are listed on the New York Stock Exchange.

taxpayer, at the very least for that division of the business. Rather, the District Court of Appeal recited that the taxpayer claimed to have conducted an investment business and then commented that the trial court findings that such stocks were connected with the petroleum business of the taxpayer, that they were useful to the taxpayer in advancing its petroleum business, and that they were held for the purpose of advancing its oil operations, were supported by the evidence. The above review of the stockholding activities involving sums in excess of $23,000,000.00 makes it abundantly clear that the security portfolio was by far the most important asset of the taxpayer; that it was managed for the purpose of enhancing its own value, and that it had no connection whatsoever with drilling for oil in California.

The taxpayer's activities in California relating to the drilling for, production and sale of oil were under the overall supervision and direction of the executive officers in Jersey City. The corporation maintained a Los Angeles office, which was departmentalized so that no one person was in charge of it. Those in charge of the various departments of the Los Angeles office reported directly to their superiors in New Jersey. In the Los Angeles office were two Vice Presidents, an Assistant Secretary, and an Assistant Secretary and Assistant Treasurer. At the Los Angeles office records were kept with regard to oil and gas production. All of the books of account and the records of the company were, however, in the custody of the Secretary and Treasurer in New Jersey.

The two divisions of taxpayer's business were not interrelated or interconnected in any manner. They were separately conducted in all respects. Each involved decisions by management unrelated to the activities or policies of the other.

There was no "unitary enterprise," either in California or elsewhere, with which the intangibles were correlated. They were held and operated as a separate enterprise, representing the most important division of the company. They had no real connection with taxpayer's oil operations and were not held for that purpose.

For example, Tide Water Associated Oil Company, throughout this period was controlled and operated by outside management which was hostile to the taxpayer. The only transaction by taxpayer with this company during the entire period in question was the sale in 1939 of 296,278.76 barrels of oil in the normal course of business, representing about 15 per cent of taxpayer's total production during that year. In the same year, taxpayer sold larger amounts of oil to each of two other companies in which it had no stock interest and sales of oil were made to thirteen different companies, depending entirely on the location of the particular wells and pipe lines, rather than stock connections.

By contrast, taxpayer received during these three years dividends from, and capital gains on the sale of shares of stock of Tide Water Associated Oil Company which totalled $1,353,554.09, or more than twice the net income from oil operations. Under these circumstances, it would be completely unrealistic to conclude that the stock of Tide Water Associated Oil Company was held or used as an integral part of the oil business or to further the interests of the oil business. To the extent, if any, that the ownership of Tide Water stock had any bearing on taxpayer's oil activities, it was unfavorable.

As to Pacific Western Oil Corporation, a controlled subsidiary whose stock constituted a substantial part of taxpayer's intangible holdings, the record shows that the

two companies shared offices in New Jersey, as well as in California, and that the taxpayer operated their oil properties together. While such combined activities undoubtedly resulted in minor reductions of expense and a more efficient operation it would be absurd to conclude that the tremendous investment in this stock was made or held for such a relatively unimportant purpose.

During this three-year period, the taxpayer received dividends, interest and capital gains on Pacific Western stock and notes in the total amount of $1,142,614.24 or nearly twice the total net income of taxpayer from all of its oil operations during this period. The principal assets of Pacific Western were not its oil properties, but rather its holdings of large blocks of stock in Mission Corporation and Tide Water Associated Oil Company. Obviously, the Pacific Western stocks and notes held by taxpayer were not integrally connected with the oil operations.

There was not one shred of evidence showing that the oil operations of taxpayer in California were conducted in any different manner from those of operators who had no intangible activities. Likewise, there is no evidence that the investment phase of the business was handled or administered any differently than it would have been if taxpayer had owned no oil properties at all. The two divisions of the business were completely separate and distinct.

The federal questions here involved were raised by the complaint, in which plaintiff set forth with particularity the prohibition imposed by the Constitution of the United States upon subjecting the income here involved to the franchise tax imposed. The Superior Court by its judgment ruled adverse to appellant's contentions.

2. The Judgment Here Involved.

By is decision and judgment, the Superior Court determined that the income from intangibles here involved was subject to the franchise tax imposed, and that as applied to such income Section 10 of the California Bank and Franchise Tax Act was valid.

The result of such judgment was that the income received in other states from intangible personal property, the physical evidences of which were located outside the State of California, was included within the measure of the franchise tax.

3. The Appeal in the State Court.

Pursuant to the provisions of applicable California law, Appellant filed an appeal in the District Court of Appeal of the State of California. In its Opening Brief, Appellant raised the federal questions here involved contending that the Constitution of the United States prohibits the taxation of income from the intangibles here involved because to levy a tax based upon such income would be to tax property located outside the jurisdiction of the taxing authority not related to business conducted by the taxpayer within the State of California and thus imposing a direct and unlawful burden upon the regulation of interstate commerce in violation of the commerce clause, of the Federal Constitution. Appellant further contended in its Opening Brief that to tax such income was, in effect, to tax the entire business of the taxpayer and, therefore, unconstitutional as imposing an unlawful burden upon the regulation of interstate commerce, and further, that to tax such income amounted to imposition of the tax upon property beyond the jurisdiction of the State in violation of the due process clause of the Fourteenth

Amendment. These contentions were also spelled out and argued in detail in Appellant's Closing Brief in the District Court of Appeal, in Appellant's Petition for Rehearing by the District Court of Appeal, and in Appellant's Petition for a Hearing by the Supreme Court of the State of California.

The fact that the federal questions were adequately and properly raised was recognized by the District Court of Appeal in its opinion to the extent that it recited that the concept of commercial domicile was recognized in *Southern Pacific Company v. McColgan*, 68 Cal. App. 2d 48, 156 P. 2d 81, a case in which the District Court of Appeal of the State of California adopted and applied the limitations imposed by the Constitution of the United States upon the taxation of income from intangibles and the collateral application of the concept of commercial domicile and unitary business.

The District Court of Appeal in the instant case, while professing to apply the constitutional limitations in the construction of Section 10 of the Bank and Franchise Tax Act, held that there was some evidence in the record supporting Appellee's position that the ownership of intangibles consisting of stocks, bonds, foreign currency and promissory notes were connected with Appellant's oil exploration and production activities conducted in California. Thus, the District Court of Appeal held $2,740,000.00 of income from stocks, and bonds to be taxable as incidental to local oil activities, producing only $650,000.00 of income. The judgment of the District Court of Appeal, therefore, incorrectly applied the constitutional limitations imposed upon the jurisdiction of a State taxing authority and paid no more than lip service to the decisions of this Court.

The Federal Questions Are Substantial.

1. The Due Process Clause of the Fourteenth Amendment Requires Some Reasonable Connection Between the Taxpayer's Interstate Activities and the Income Sought to Be Taxed.

This case involves the application of the doctrine of commercial domicile to the facts relating to the taxpayer's activities during the years here in question. This Court has spoken often with regard to the limitations imposed upon the power of taxation by a State instrumentality. It has spoken often with regard to the right of a State to tax income from intangibles.

In *International Paper Co. v. Massachusetts,* 246 U. S. 135, 62 L. ed. 624, 38 S. Ct. 292, this Court, in an opinion by Mr. Justice Van Devanter, set forth principles previously announced by this Court, stating:

> "3. Consistently with the due process clause, a State cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the State.
>
> "4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a State in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the State cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the State."

Again in *First Bank Stock Corp. v. Minnesota,* 301 U. S. 234, 81 L. ed. 1061, 57 S. Ct. 677, Mr. Justice Stone delivered the opinion of this Court, again restating

the principles and considerations involved in the taxation of intangibles, as follows:

> "The rule that property is subject to taxation at its situs, within the territorial jurisdiction of the taxing state, readily understood and applied with respect to tangibles, is in itself meaningless when applied to intangibles which, since they are without physical characteristics, can have no location in space. See Wheeling Steel Corp. v. Fox, supra (298 U. S. 209, 80 L. ed. 1147, 56 S. Ct. 773). The resort to a fiction by the attribution of a tax situs to an intangible is only a means of symbolizing, without fully revealing, those considerations which are persuasive grounds for deciding that a particular place is appropriate for the imposition of the tax. Mobilia sequuntur personam, which has won unqualified acceptance when applied to the taxation of intangibles, Blodgett v. Silberman, 277 U. S. 1, 9, 10, 72 L. ed. 749, 756, 757, 48 S. Ct. 410, states a rule without disclosing the reasons for it. But we have recently had occasion to point out that enjoyment by the resident of a state of the protection of its laws is inseparable from responsibility for sharing the costs of its government, and that a tax measured by the value of rights protected is but an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. See New York ex rel. Cohn v. Graves, 300 U. S. 308, ante, 666, 57, S. Ct. 466, 108 A. L. R. 721.
>
> "The economic advantages realized through the protection, at the place of domicile, of the ownership of rights in intangibles, the value of which is made the measure of the tax, bear a direct relationship to the distribution of burdens which the tax effects. These considerations support the taxation of intangibles at the place of domicile, at least where

> they are not shown to have acquired a business situs elsewhere, as a proper exercise of the power of government. Like considerations support their taxation at their business situs, for it is there that the owner in every practical sense invokes and enjoys the protection of the laws, and in consequence realizes the economic advantages of his ownership. . . ." (301 U. S. 234, at 240.)

More recently this Court stated in *Miller Bros. Company v. Maryland,* 347 U. S. 340, 98 L. ed. 744, 74 S. Ct. 535:

> ". . . But the course of decision does reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a State and the person, property or transaction it seeks to tax. . . ."

We submit that the legal principles applied by this Court were stated correctly by the Supreme Court of Minnesota in *Marshall-Wells Co. v. Commissioner,* 220 Minn. 458, 20 N. W. 2d 92, 95, as follows:

> "The power of states to tax intangibles of foreign corporations has been passed upon by the United States Supreme Court a number of times, but it is to be noted that such decisions have upheld the tax upon the theory that the evidence established not only that the corporation was commercially domiciled in the taxing state, but also that the intangibles had acquired a business situs or were a part of or correlated with a unitary enterprise of said corporation there."

In the instant case, the District Court of Appeal, upon review of the judgment of the Superior Court, did not, although requested by Appellant herein, apply these con-

stitutional precepts and standards. Rather, it assumed that where a foreign corporation conducted oil drilling and exploration activities within California, as well as in other states, there was a power in California to tax income from intangibles in the nature of stocks, bonds and promissory notes, merely because the majority of such investments were in major oil companies, even though they had no material connection with taxpayer's oil operations. The District Court of Appeal and the Superior Court did not investigate the record to determine whether the intangibles were reasonably related to the limited California activities. The District Court of Appeal, moreover, relied upon inferences made by the Superior Court that the income from intangibles was related to local activities. Such inferences were unjustified and unsupported, and such inferences were not reviewed by the District Court of Appeal.

In the instant case, the intangibles had acquired a business situs not in California, but in New Jersey, where they were held, managed and controlled. Likewise, it cannot fairly be concluded that these intangibles were a part of or correlated with a unitary enterprise of the corporation in California.

This Court has been particularly careful to ascertain that the rules and principles laid down by it have not been avoided by the recitation of State Courts that the constitutional standards have been applied. In the present case the lower courts have professed to follow the constitutional standards and principles, but have said that upon a review of the facts there was evidence to support the findings that a commercial domicile for these intangibles existed within California and that such intangibles were related to business conducted in California, and that such

intangibles were of a benefit to the activities conducted in California, and that such intangibles were protected by California.

In the past, where the mixed question of law and fact regarding business situs of intangibles or commercial domicile or domiciles of foreign corporations was raised in this Court, this Court has rightly reviewed the relevant facts and factors relating to the taxpayer's activities within the jurisdiction seeking to levy a tax, and has determined, in effect, from the evidence itself, whether the power to tax such intangibles by State authority constitutionally exists. Appellant seeks just such a review here. Appellant contends that the proper application of the constitutional standards to the facts and factors here involved, shows beyond question that this taxpayer conducted an independent division of its business from the State of New Jersey; that that business was in the nature of an investment business; and that that division of its business was controlled and operated by the officers and directors at the company's New Jersey office.

Appellee has contended in the courts below that these investments and the income therefrom were related to California activities and operations. This contention is based primarily upon the fact that the taxpayer's California operations involved the exploration for oil and the production of oil from California lands, and that the investments were primarily in oil companies. Appellee contended in the trial court, and the trial court found, that the taxpayer's business was "the petroleum business," and that there was a single commercial domicile, namely, in California, where the majority of the oil drilling activities were conducted. The conclusions of the lower courts, upon the mixed question of fact and law, are erroneous in

two important particulars: one, the lower courts assumed that there could be only one commercial domicile; and, two, the lower courts found that there was a commercial domicile in California in spite of the strong factors showing that the management and control of even the California activities emanated from New Jersey.

The courts below assumed incorrectly that if the oil-producing division had its commercial domicile in California, it automatically followed that all income from intangibles would be taxable in California, for the assumed reason that a corporation can have only one commercial domicile.

The decisions of this Court to date have not held that a corporation may have only one commercial domicile for purposes of State taxation of intangible income. Such a holding would not only be illogical but would result in a scramble by the States to assert such jurisdiction in the numerous cases where corporations operate several separate divisions of business in different states. For example, General Dynamics Corporation has a number of divisions, including the Electric Boat Division in Connecticut, the Electro Dynamic Division in New Jersey, the Convair (airplane) Division in California and the Stromberg-Carlson Division in New York. Each of these states could assert with reason that a particular division had its "commercial domicile" there and for that reason attempt to tax all the intangible income of the company.

We submit respectfully that a corporation can have more than one "commercial domicile" and that as to each state only the intangibles which are integrally connected wtih the business division in that state are subject to its tax.

In the instant case taxpayer had a commercial domicile in New Jersey as to its very extensive investments and activities connected therewith. It seems clear that New Jersey could have levied a franchise tax on all of this intangible income and that it would have done so had not its tax laws provided an express exemption for the taxpayer.

This Court and lower courts recognized often that the protecting and controlling of investments and of participating in the management of corporations in which stock ownership is held, may constitute a particular legitimate business function and indeed may be a predominant activity of the corporation.

First Stock Corp. v. Minnesota, 301 U. S. 234, 81 L. ed. 1061, 57 S. Ct. 677;

Edwards v. Chile Copper Co., 270 U. S. 452, 70 L. ed. 678, 46 S. Ct. 345;

Argonaut Consolidated Mining Co. v. Anderson (C. A. 2d N. Y.), 52 F. 2d 55;

United States v. Hercules Mining Co. (C. A. 9th Cal.), 119 F. 2d 288, cert. den., 314 U. S. 658, 86 L. ed. 527, 62 S. Ct. 110;

Section Seven Corp. v. Anglin (C. A. 9th Cal.), 136 F. 2d 155;

American Investment Securities Co. v. United States (C. A. 1st Mass.), 112 F. 2d 231.

2. The Commerce Clause Prohibits the Imposition of a Tax Upon Interstate Business as the Right to Conduct Local Business.

Not only does the taxation of income from intangibles not related to local business run afoul of the due process clause, but it also contravenes the limitations imposed upon the taxation of interstate commerce.

International Paper Co. v. Massachusetts, 246 U. S. 135, 62 L. ed. 624, 38 S. Ct. 292.

Conclusion.

Appellant respectfully suggests that this appeal brings before this Court substantial federal questions under the Constitution that are of far reaching importance to the many corporations engaged in multiple businesses and in businesses crossing state lines. The legal principles involved and the practical application of such principles demonstrate that the questions here presented are so substantial as to require plenary consideration by this Court with briefs on the merits and oral argument.

Respectfully submitted,

JOSEPH D. PEELER,

JOHN P. POLLOCK,

Counsel for Appellant.

APPENDIX A.

Opinion of the District Court of Appeal.

[Civ. No. 8521. Third Dist. Nov. 8, 1955.]

Pacific Western Oil Corporation (a Corporation), Appellant, v. Franchise Tax Board, Respondent.

Appeal from a judgment of the Superior Court of Sacramento County. Grover W. Bedeau, Judge. Affirmed.

Action to recover franchise taxes paid under protest. Judgment for defendant affirmed.

Musick, Peeler & Garrett, Joseph D. Peeler and John P. Pollock for Appellant.

Edmund G. Brown, Attorney General, James E. Sabine and Irving H. Perluss, Assistant Attorneys General, and Ernest P. Goodman, Deputy Attorney General, for Respondent.

VAN DYKE, *P. J.*—This is an appeal from a judgment in favor of defendant Franchise Tax Board in an action brought to recover franchise taxes paid by plaintiff under protest. The franchise taxes so paid are attributed to George F. Getty, Inc., a Delaware corporation, hereinafter generally referred to as the taxpayer. Appellant, Pacific Western Oil Corporation, another Delaware corporation, is the successor in interest to the taxpayer.

The taxes relate solely to income received by the taxpayer and a predecessor corporation, Getty, Inc., at their offices in Jersey City, New Jersey, from intangible assets (stocks, bonds and notes) located outside of California. The controversy centers around the propriety of including, in the measure of the franchise tax imposed by California, income received by the taxpayer, George F. Getty,

Inc., and its predecessor, Getty, Inc., from these various intangible assets. The income was included in the measure of the franchise tax because, according to the commissioner's contentions, the commercial domicile of the taxpayer and of Getty, Inc., was in the State of California and the security holdings of these corporations were related to and useful in the business activities carried on by them in this state. The issues presented by the appeal relate primarily to the location of the commercial domicile of the taxpayer and of Getty, Inc., and the relationship of their security holdings to their operations in the production and sale of petroleum.

The appellant, Pacific Western Oil Corporation, is a Delaware corporation which on May 31, 1946, succeeded by merger to the assets and liabilities of George F. Getty, Inc., the taxpayer. George F. Getty, Inc., was formed under the laws of the State of Delaware on December 30, 1936. This corporation succeeded under an agreement of consolidation to the assets and liabilities of three corporations, namely: George F. Getty, Incorporated, a California corporation; George F. Getty Oil Company, a Delaware corporation; and George F. Getty Petroleum Corporation, a Delaware corporation. On August 31, 1937, George F. Getty, Inc., also succeeded by merger to the assets and liabilities of Getty, Inc., a Delaware corporation.

Director Meetings Before and After Merger.

For many years prior to June of 1936, all the meetings of stockholders and directors of the corporations which were parties to the consolidation were held in California. Between the latter part of June, 1936, and the date of con-

solidation, meetings of stockholders and directors of George F. Getty Oil Company and George F. Getty Petroleum Corporation were held in the State of New Jersey. In the case of George F. Getty, Incorporated, such meetings were held in California until the date of consolidation on December 30, 1936. In the case of Getty, Inc., the meetings of shareholders and directors were held in California during the period March 1, 1934, through June 4, 1936. After June 26, 1936, to the date of the merger on August 31, 1937, the meetings of stockholders and directors of Getty, Inc., were held in New Jersey. The meetings of the directors and stockholders of taxpayer George F. Getty, Inc., were held in New Jersey during the period here in controversy.

In the period between January 1, 1936, and June of 1936, Mr. Emil Kluth, who resided in California, was president of Getty, Inc., and of the three corporations which were consolidated to form George F. Getty, Inc. During June of 1936, Mr. Kluth was succeeded as president of all of the companies, except George F. Getty, Incorporated, by Mr. Harold Rowland who resided in New Jersey. Mr. Kluth remained president of George F. Getty, Incorporated, until the date of the consolidation in December of 1936.

Income From Intangibles.

The source of the intangible income here involved was primarily dividends on stock held by George F. Getty, Inc., and Getty, Inc., in various oil companies. In addition, a portion of the income was received as a result of sales of Tide Water Associated Oil Company stock and Pacific Western Oil Corporation stock and from the sale

of Pacific Western notes. Finally, a portion of the income consisted of interest on Pacific Western Oil Corporation notes and interest on German bonds. The income from intangibles for the period 1937 through 1939 was as follows:

Dividends	$2,061,332.50
Interest	327,911.26
Profit on sales of stocks and notes	351,078.11
Making a total of	$2,740,321.87

The dividends were received primarily from Tide Water Associated Oil Company and Pacific Western Oil Corporation. Additional dividends were received from Minnehoma Oil & Gas Company and Richfield Oil Corporation.

How the Intangibles Were Acquired.

On December 31, 1939, George F. Getty, Inc., held 372,454 shares of Tide Water Associated Oil Company stock. All the shares of Tide Water Associated Oil Company stock held by George F. Getty, Inc., were received at the time of its formation from its predecessor corporation, George F. Getty, Incorporated, or from Getty, Inc., at the time of its merger with the taxpayer on August 31, 1937. Neither the taxpayer, George F. Getty, Inc., nor Getty, Inc., purchased any shares of Tide Water Associated Oil Company stock in the years 1937, 1938 and 1939. No shares of Tide Water Associated Oil Company stock had been purchased by George F. Getty, Incorporated, after January 1, 1934. Getty, Inc., had not acquired any shares of Tide Water stock after June 25, 1935. On December 31, 1939, George F. Getty, Inc.,

held 679,019 shares of Pacific Western Oil Corporation stock. Of these shares, approximately 6,200 were purchased by George F. Getty, Inc., in the period June 7, 1939, to August 31, 1939. All of the remainder of the Pacific Western stock was acquired by George F. Getty, Inc., from George F. Getty Oil Company upon the consolidation on December 30, 1936, or from Getty, Inc. upon the merger of August 31, 1937, or from Minnehoma Oil and Gas Company on its liquidation in December of 1938. None of the shares received from George F. Getty Oil Company, Getty, Inc., or Minnehoma Oil Company had been purchased by any of these corporations after March 20, 1935. George F. Getty, Incorporated, a predecessor corporation, had acquired 643,664 shares of stock of Minnehoma Oil Company in February of 1933 and 2,270 shares of Minnehoma Oil and Gas Company stock in April of 1934. Upon the consolidation, George F. Getty, Inc., succeeded to these shares of Minnehoma stock. No additional Minnehoma stock was acquired by George F. Getty, Inc., during the period here in controversy. In 1937, George F. Getty, Inc., received a small amount of Richfield Oil Corporation stock which produced a total of $259.50 in dividends. This stock was received in satisfaction of a claim of a predecessor corporation against Richfield Oil Corporation. All the German bonds held by George F. Getty, Inc., were received from Getty, Inc., at the time of the merger on August 31, 1937; of the 666,000 German bonds held by George F. Getty, Inc., on December 31, 1939, approximately 18,000 were acquired by Getty, Inc., during the period here in controversy. George F. Getty, Inc., owned stock in two other corporations, Santa Fe Investment Company and the Getty Realty Cor-

poration. No income derived from either of these corporations is here in controversy. George F. Getty, Inc., received 200,000 shares of stock in the Santa Fe Investment Company from J. Paul Getty on July 27, 1938, in exchange for a $236,420 note of Pacific Western Oil Corporation. Getty Realty Corporation, a New York corporation, was organized by the taxpayer to own and operate the Hotel Pierre in New York City. George F. Getty, Inc., purchased 500 shares of Getty Realty Corporation stock on October 11, 1938, for $50,000. This represented all the outstanding stock of Getty Realty Corporation. In 1938 the taxpayer loaned Getty Realty Corporation $2,310,100.

Payrolls and Employees.

In 1937 taxpayer, George F. Getty, Inc., had 496 employees, of whom an average of 463 were employed in California; out of a total payroll of $1,066,638.53, California employees received $993,933.72. During the period here in controversy, George F. Getty, Inc., had four employees in the New Jersey office of that company. These were Mr. Rowland, Mr. Krug and two secretaries. These employees in the New Jersey office worked for a number of other corporations as well as for George F. Getty, Inc.

Records.

At the Los Angeles office of George F. Getty, Inc., the assistant secretary of that company and five other employees were engaged in keeping the accounting records of the taxpayer. The general ledger of the company and the detailed accounting records with relation to oil and gas production were kept at the Los Angeles office. The financial and operating statements of the taxpayer were prepared in the Los Angeles office and forwarded to New

Jersey. The annual reports were prepared by the assistant secretary in the Los Angeles office. Each of the offices of the taxpayer kept its own records of cash, receipts, and disbursements which were sent to Los Angeles to be collated and entered into the final operating statement. The accounting records kept by the New Jersey office of the taxpayer consisted of the cash receipts and disbursements book, the stock records of the company, and a record of activities relating to the investments and financing of the company.

Salaries of Officers.

During 1939, Mr. Rowland received a total salary of $6,770, of which $6,415 was paid to him as vice-president, treasurer, and director of Pacific Western Oil Corporation, and $255 was paid for his work as president and director of the taxpayer. He also received $100 as vice-president and director of Mission Corporation. During 1939, Mr. Emil Kluth, vice-president of the taxpayer, received a total salary of $11,300, of which half was charged to the taxpayer and half to Pacific Western Oil Corporation. Mr. H. M. Macomber, another vice-president of the taxpayer, received a total salary of $9,700, of which $6,466.62 was charged to Pacific Western Oil Corporation and the remainder was charged to the taxpayer.

Oil Business in California.

During the year 1937, the oil, gas, and gasoline sales of the taxpayer in California amounted to $1,425,659.23, while sales in other states amounted to $258,716.46. In 1938, California sales of the taxpayer were $1,533,061.05; sales in other states were $231,101.41. In 1939, the taxpayer's sales in California amounted to $1,435,517.95;

sales in other states totaled $232,761.54. In 1937, Getty, Inc., made sales of oil, gas, and gasoline in the sum of $161,696.77; all of its sales were made in California. In 1937, the taxpayer produced a total of 2,181,043 barrels of oil, of which 1,810,660 were produced in California. In 1938, its total oil production was 2,095,648 barrels, of which 1,789,559 barrels were produced in California. In 1939, the total oil production of the taxpayer was 1,959,-113 barrels, of which 1,657,470 were produced in California.

Fixed Assets.

At the time of the formation of the taxpayer in December of 1936, the total net fixed assets of the corporation in California were valued at $592,166.81. On December 31, 1939, the value of the net fixed assets in California was $1,236,406.19. The value of net fixed assets in other states was $499,066.17 on December 31, 1936, and $534,002.13 on December 31, 1939. At this time of the merger, the value of the oil properties of Getty, Inc., in California was $234,418.87, and in other states, $2,-681.04.

Oil Income.

The taxpayer claimed net losses on its California Franchise Tax returns for 1937 and 1938; and reported a net income of $26,244.02 on its 1939 return. However, the revised net income to be attributed to California for franchise tax purposes, by virtue of the taxpayer's oil operations during the period here involved, was as follows:

For 1937	$304,577.01
For 1938	185,721.20
For 1939	152,214.67

Returns.

The federal income tax returns of George F. Getty, Inc., for the years 1937, 1938, and 1939 were filed in Los Angeles, California. By section 536, subdivision 2, of the Internal Revenue Code, these returns are to be made to the collector of the district in which is located the principal place of business of the corporation.

Taxes by Other States.

No other state than California has attempted to impose a tax on, or measured by, the income from intangibles here in controversy. (In this connection, it should be stated that the taxpayer contends this factor is the by-product of an exemption clause in the New Jersey franchise tax laws which enabled the corporation to be exempt from New Jersey taxes; and that it does not mean that because no tax was collected by New Jersey, that state thereby indicated in any way that the same income here taxed could not properly be taxed by New Jersey save for the express exemption.) Neither the taxpayer nor Getty, Inc., paid ad valorem property taxes to any state on the intangibles here in controversy.

Business in State of Creation.

The taxpayer did not engage in any business activities in Delaware, the state of its creation, at any time during the period December 30, 1936, to and including December 31, 1939. Likewise Getty, Inc., did not engage in any business activity in Delaware at any time during the period January 1, 1937, to and including August 31, 1937, the date of its merger with the taxpayer.

Ownership of Taxpayer's Stock.

Mr. J. Paul Getty owned all the stock of the taxpayer, either individually or as a trustee. During the years 1937, 1938 and 1939, the legal domicile of Mr. J. Paul Getty was in California, but he leased, and when not traveling, lived in a penthouse in New York City and used the corporate offices in New Jersey.

There is no substantial disagreement between the parties hereto as to the existence of the foregoing facts. The controversy centers around inferences which may be drawn from those facts. The trial court found that the taxpayer and Getty, Inc., had their "commercial domicile" in California during the tax period; that the stockholdings of the taxpayer and Getty, Inc., in other oil companies were connected with the taxpayer's and Getty, Inc.'s petroleum business and were useful in advancing the interests of the taxpayer and Getty, Inc., in the petroleum business. The trial court therefore concluded that inclusion of the income from the intangibles owned by the taxpayer and Getty, Inc., during the taxing period in the measure of the franchise tax assessed against the taxpayer was valid and that the taxpayer was entitled to no relief in this action.

The concept of a commercial domicile of a corporation has been recognized in this state in the case of Southern Pacific Co. v. McColgan, 68 Cal. App. 2d 48 [156 P. 2d 81]. In that case, income which the Southern Pacific Company, a Kentucky corporation, received from intangible assets was included in the measure of the tax imposed on the company under the provisions of the California Bank and Corporation Franchise Tax Act. There the court determined that the Southern Pacific Company, although not incorporated in California, had a "commercial

domicile" in this state and also determined that California had the power to tax income received by the Southern Pacific Company from its intangible assets. The statutory provisions which the court construed in the Southern Pacific Company case were, for the purposes of this case, the same as those in effect during the greater part of the period here involved. Although the statute was amended during the taxpaying period here in controversy, those amendments do not affect the applicability of the rule of Southern Pacific Company case to the issues presented in this case.

In the Southern Pacific Company case, the taxpayer contended that income from its intangibles could not legally be a part of the measure of its tax, under the California Franchise Tax Act, because such income was produced by the taxpayer's stockholding activities and investment activities in connection therewith, which activities, in turn, constituted a separate business from its operations otherwise; and that, therefore, New York, though not the state of its incorporation, was yet its "commercial domicile" with respect to such activities. Here, the taxpayer contends that its activities in respect of its intangibles constituted a separate business from its petroleum business and that not Delaware, the state of its incorporation, but New Jersey, where it maintained offices and where its directors met and where its intangible assets were physically held, was its "commercial domicile" with respect to such activities. Conversely, the taxpayer insists that its petroleum business conducted in California and for most of the taxpaying period also in the mid-continental field, was a business separate and apart from its intangible assets activities. The holding in the Southern Pacific Company case is not challenged as

a rule of law. The contention of the taxpayer is that the rule has no application under the facts disclosed by the record here. Says the appellant: ". . . [T]his appeal, as did the trial court's determination below, depends upon the factual inferences, the ultimate findings of facts and the legal conclusions to be made from such inferences and findings in a record where there is no real dispute as to the detailed facts."

Appellant claims it conducted an investment business. In support of its claim that, during the taxing period involved, taxpayer was engaged in a separate business, distinct from its oil production business, consisting of the handling, the investing, and the managing of its intangible assets, taxpayer points to the following matters appearing in the testimony:

At the time of its organization, taxpayer acquired oil properties in the State of California carried on its books at $592,166.81 and oil properties in other states carried on its books at $499,066.17, or a total of $1,091,232.98. Current assets were valued at $882,880.62, prepaid and deferred charges at $34,353.61, and total investments were carried on its books at $8,355,871.39. These investments included the following:

	Book Value
316,000 shares Pacific Western Oil Corp.	$2,130,493.57
337,700 shares Tide Water Associated Oil Co.	2,240,545.00
645,934 shares Minnehoma Oil & Gas Co.	1,614,835.00
Notes of Pacific Western Oil Corp.	2,391,997.82
Stock Purchase Options....	45,000.00

For purposes of the consolidation, a valuation was made of the various assets as of December 30, 1936. This valuation reflected a total value of $4,500,000 for all the oil properties in California and other states, as compared with a total value of $21,913,216.32 for the intangibles. On August 31, 1937, taxpayer acquired by statutory merger all the assets and liabilities of Getty, Inc., a Delaware corporation, qualified to do business in New Jersey and California. At the time of the merger, Getty, Inc., carried on its books California oil properties at a net cost of $234,418.87 and oil properties outside of the State of California at $2,681.04, or a total of $237,099.91. In addition, it had current assets of $63,319.03 and investments which it carried on its books at a cost of $2,779,-956.26. A valuation of these assets for the purpose of the merger showed the oil properties of Getty, Inc., were worth $237,099.91, as compared with a value of $7,331,-905.66 for the investments. As of the date of the merger, the oil properties of George F. Getty, Inc., in all states were valued at $5,500,000, while the investments were valued at $23,166,324.04. For some time prior to 1936, predecessor corporations of the taxpayer had concluded that it was much more advantageous for them to expand by acquiring securities and possible control of other corporations than to put their money into actual oil operations. In furtherance of this decision, they had started out by acquiring control of Pacific Western Oil Corporation and were making investments in Tide Water Associated Oil Company and Mission Corporation. After acquiring a substantial block of Tide Water Associated Oil Company, directly and through Mission Corporation, they had endeavored with Mission Corporation to obtain influence in the management of that corporation. This de-

veloped into a proxy fight early in 1936 which was lost. Such predecessor corporations concluded that in order to protect and enhance their investment in Tide Water Associated Oil Company and to carry on their other investment activities, it was essential to remove the principal office from California to the East, inasmuch as the headquarters of Tide Water was in New York, the bankers they had to do business with were in New York, and most of the stockholders in Tide Water were located east of the Mississippi River. They decided to engage a Wall Street firm of attorneys and enlist the assistance of New York bankers in an endeavor to assert a larger influence on Tide Water to protect and enhance their investments in that company. They decided it made good business sense to move to the East so that the general head office would be close to the pulse of the activities in their expanding program. Accordingly, in March, 1936, the predecessor corporations of the taxpayer established their executive office and headquarters at 15 Exchange Place, Jersey City, New Jersey, across the river from New York City and within five minutes commuting time on the Hudson Tube. On June 26, 1936, the directors of Getty, Inc., adopted a resolution establishing 15 Exchange Place, Jersey City, New Jersey, as "the principal office of this company outside of the State of Delaware." At the same meeting the directors changed the by-laws to provide that meetings of the stockholders of the corporation be held at the New Jersey office and elected Harold L. Rowland, a resident of the State of New Jersey, as president in place of Mr. Kluth. The directors passed at this meeting a resolution authorizing the California officers to handle "the operation of this corporation's oil properties in California," but providing that they should have no power,

without the express direction and approval of the head office in New Jersey, to (a) acquire new leases, (b) execute contracts, or (c) sell any oil except "spot oil." At the first meeting of the board in New Jersey, Harold L. Rowland, Millard F. Tompkins, Jr., and Charles F. Krug, Jr., all residents of New Jersey, were elected directors of the company while Mr. Rowland was elected president and Mr. Krug was elected secretary and treasurer. Authority was also given to various persons, all located in the East, to handle brokerage accounts and to arrange for loans. The by-laws provided that board meetings and stockholders' meetings were to be held at the New Jersey office. From the inception of the taxpayer and throughout the years 1937, 1938 and 1939, the business activities carried on, in or from the Jersey City, New Jersey, office by the taxpayer included the following: Holding of all directors' and stockholders' meetings; activities in connection with the purchase and sale of securities, the collection of dividend and interest income and profits from the sale of securities; the obtaining of financing; activities in connection with enhancing and protecting the taxpayer's investments. In summation, appellant points out that during the years 1937, 1938 and 1939 the purchases, sales, loans, etc., as described, all in the Jersey City office, amounted to total transactions of more than $7,000,000 and resulted in capital gains of more than $300,000.

Neither the taxpayer, nor Getty, Inc., was a California corporation; and neither was a New Jersey corporation. Both were incorporated under the laws of Delaware, and neither, at any time here material, conducted any business operations in that state. Thus the domiciliary status of both corporations with respect to the State of Delaware was no more than paper status.

With the foregoing evidence before it, the trial court made the following findings of fact:

That the three corporations, George F. Getty, Incorporated, George F. Getty Oil Company and George F. Getty Petroleum Company, which were consolidated to form the taxpayer, George F. Getty, Inc., were primarily interested and engaged in the petroleum business for many years immediately prior to the consolidation of these corporations. By far the greater portion of their business affairs and activities were carried on and managed in, and protected by, the State of California. Throughout the period December 30, 1936 to and including December 31, 1940, the taxpayer George F. Getty, Inc., was engaged in business in the State of California. Throughout the period December 30, 1936, to and including December 31, 1939, among all the states in which it carried on business activities, the taxpayer George F. Getty, Inc., received the greatest protection and benefits from the State of California. In that state were kept the principal accounting records of the taxpayer. Throughout the critical period the taxpayer was primarily and principally engaged in the petroleum business and was not engaged in the investment business. Throughout the same period, by far the larger portion of the activities of the taxpayer, George F. Getty, Inc., were carried on, conducted, managed, and controlled by the taxpayer in the State of California. On, and after, May 1, 1938, the effective date of an agreement with the Skelly Oil Company, the taxpayer had no employees engaged in oil production activities outside of California. The corporations in which the taxpayer held stock (outside of the Getty Realty Co.) were connected with the petroleum business of said taxpayer and these stockholdings were useful to the taxpayer in advancing its

petroleum business. The taxpayer permanently held stock in other corporations in the petroleum industry in order to advance its interests in the petroleum industry and did not acquire stock for the purpose of trading in shares; no substantial sales of stock were made by the taxpayer. The holding of stock in other corporations engaged in the petroleum business was useful to the taxpayer in providing a proper and sufficient marketing outlet for its petroleum products. The activities of the taxpayer in the petroleum industry were not managed or controlled by the New Jersey officers of taxpayer, but were managed and controlled by the California officers. The taxpayer during the critical period engaged in no business activities in the State of Delaware. Neither Delaware nor New Jersey, nor any other state, collected or levied a property tax on the intangibles of the taxpayer, nor did any state other than California collect or levy any tax on the income or measured by the income received by the taxpayer from these intangibles. Finally, the court found that throughout the tax period the commercial domicile of the taxpayer, George F. Getty, Inc., was in California; that said taxpayer did not have a commercial domicile either in the State of New Jersey or in the State of Delaware, or in any other state than California; and that throughout the period the principal place of business of the taxpayer was in California.

It is not seriously contended that if the record furnishes support for the fact findings of the trial court hereinbefore related, then those findings justify and support the conclusions of law and the judgment which has been appealed. Respondent, contending that the factual support is sufficient, states the following summary of facts:

The commercial domicile of the taxpayer was in California during the tax period because: (1) The revenue from sales of gas, oil and gasoline in California was many times gretater than the revenue derived from sales in all other states combined. (2) The value of the fixed assets of the taxpayer in California were several times the value of fixed assets in other states. (3) Throughout the period here in controversy between 90 per cent and 99 per cent of the employees of the taxpayer were performing their services in California. (4) The income from intangibles here in controversy has not been taxed by any state other than California. (5) The day to day management of the oil, gas, and gasoline production and sales activities of the taxpayer was carried on in California. (6) Payments in connection with the maintenance and operation of plaintiff's petroleum business were made from its Los Angeles office, including payrolls. (7) The principal accounting records of the taxpayer were kept in California. (8) The predecessor corporations which were consolidated to form the taxpayer were managed and controlled in California and their principal activities were carried on in this state. (9) The taxpayer did not carry on any business activity in Delaware. the state in which it was incorporated. (10) The taxpayer filed its federal income tax returns in California (such returns under the provisions of the Internal Revenue Code must be filed in the district where the taxpayer has its principal place of business or principal office or agency.) (11) Mr. J. Paul Getty, who held all of the shares of the corporation either individually or as a trustee, had his legal domicile in California during the years 1937 to 1939 inclusive. (12) The directors of the taxpayer followed a practice of ratifying the completed acts of the California officers of the corporation with respect to oil production activities rather than directing the

California officers in advance with respect to the procedures they should follow. In 1939, in its annual report, the taxpayer stated: "The principal transactions for the year 1939 were in connection with direct oil operations." The same report pointed out that in 1939 the taxpayer realized a 17.8 per cent profit on its direct oil operations as opposed to a 6.1 per cent return on its other investments; throughout the tax period California was the center of oil production activity of the taxpayer as is shown by the record of oil production, in barrels, hereinbefore stated. The net oil, gas and gasoline sales of the taxpayer during the tax period in California totaled about 4,500,000 barrels, while such sales in other states during that period totaled about 750,000 barrels. During the period January 1, 1937, through August 31, 1937, the net income of Getty, Inc., from sales of oil, gas and gasoline was $161,696.77, all of which was realized from sales made in California.

From an examination of the entire record, we are satisfied that the factual findings of the trial court all find substantial support therein. And of course when we say this, we are deciding this appeal for the reason that, as heretofore noted, the parties do not dispute but that if the trial court findings are supported by the evidence then the judgment appealed from must be affirmed. There is no doubt but that there is in the record much that supports the trial court's findings and there is also much that militates against those findings. But this situation of the record does not aid or comfort the appellant.

The judgment appealed from is affirmed.

Peek, *J.*, and Schottky, *J.*, concurred.

APPENDIX B.

Judgment of Superior Court.

In the Superior Court of the State of California, in and for the County of Sacramento.

Pacific Western Oil Corporation, a corporation, Successor in Interest to George F. Getty, Inc., Plaintiff, vs. Franchise Tax Board, State of California, Defendant. No. 76755.

The above entitled cause having come on regularly for trial before the above entitled court on the 21st day of May, 1951, the Honorable Grover A. Bedeau, Judge presiding, Joseph D. Peeler, Esq., appearing for plaintiff, and Edmund G. Brown, Attorney General of the State of California, by James E. Sabine and Irving H. Perluss, Assistant Attorneys General of the State of California, and Ernest P. Goodman, Deputy Attorney General, appearing for defendant, and evidence both oral and documentary having been introduced, and the cause having been submitted upon written briefs, the court being fully advised in the premises and having heretofore made and signed its findings of fact and conclusions of law, and having ordered that judgment be entered in accordance therewith,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff, Pacific Western Oil Corporation, take nothing by its complaint and that defendant have judgment for its costs incurred herein in the sum of $

Dated this 1st day of July, 1953.

/s/ GROVER W. BEDEAU,
Judge of the Superior Court.

APPENDIX C.

Memorandum Opinion of Superior Court.

In the Superior Court of the State of California, in and for the County of Sacramento.

Pacific Western Oil Corporation, a corporation, Successor in Interest to George F. Getty, Inc., Plaintiff, vs. Franchise Tax Board, State of California, Defendant. No. 76755.

In this action plaintiff, successor in interest to George F. Getty, Inc. (referred to herein as taxpayer), seeks to recover $178,952.82 taxes and interest paid by taxpayer for the years 1937-38-39 on account of franchise taxes. The taxes were paid under protest. The taxes in dispute are based upon income received by taxpayer from intangible assets.

Taxpayer was incorporated under the laws of Delaware on December 30, 1936, succeeding by agreement of consolidation to the assets and liabilities of three corporations,—to-wit: George F. Getty Petroleum Corporation (Delaware corporation), George F. Getty Oil Company (Delaware corporation), and George F. Getty, Incorporated (California corporation). The taxpayer acquired by the consolidation the following:

Current assets	$ 882,880.62	
Net fixed assets	1,091,232.98	
Prepaid & deferred charges	34,353.61	
Total	$2,008,467.21	
and the following investments:		
316,000 shares Pacific Western Oil Corp. (plaintiff herein)	$2,130,493.57	
337,700 shares Tidewater Associated Oil Co.	2,240,545.00	
645,934 shares Minnehoma Oil & Gas Co.	1,614,835.00	
Pacific Western notes	2,319,997.82	
Stock purchase options	45,000.00	
Royalty interest	5,000.00	
	$8,355,871.39	
or total assets of		$10,364,338.60

On August 31, 1937, Getty, Inc., a Delaware corporation, merged with taxpayer. Its assets were valued at $7,632,324.50; its liabilities were $95,649.42 current, and $12,560.84 deferred credits. The investments which taxpayer received from this merger were as follows:

Pacific Western notes receivable	$ 495,259.22
5,340 shares George F. Getty, Inc.	2,197,997.40
116,200 shares Pacific West.	2,905,000.00
Pacific Western warrants for 13,590 shares	9,109.15
77,750 shares Tidewater Assoc.	1,555,080.00
660,000 par German Govt. bonds	168,152.50
Royalty owed	1,307.29

The three corporations that were merged into taxpayer at the time of its incorporation and Getty, Inc., merged on August 31, 1937, were primarily interested and engaged in the petroleum industry and by far the greater portion of their business affairs and activities were carried on and conducted in and protected by the State of California.

Further assets were received by taxpayer from the dissolution of Minnehoma Oil & Gas Company, in which taxpayer owned 645,934 shares of 700,000 outstanding. By that dissolution taxpayer received, besides oil properties, the following:

Cash	$ 185,450.32
Accounts receivable	16,215.05
243,319 shares Pac. West.	1,185,005.12
Pacific Western notes	310,993.34

Although taxpayer was incorporated in the State of Delaware, it transacted no business of any kind therein. At its inception it established a principal executive office at 15 Exchange Place, Jersey City, New Jersey. There it maintained two officials, Harold L. Rowland, President, and Charles F. Krug, Secretary and Treasurer, and employed two secretaries. The accommodations in New Jersey consisted of two offices. Other corporations maintaining headquarters at the same place were the plaintiff, Pacific Western, Mission Corporation, and Minnehoma Gas & Oil Company. The management of all of the corporations involved were interwoven with one another. J. Paul Getty, individually and as trustee, owned all the stock in taxpayer. Mr. Rowland, president and director of taxpayer, was (1) director of Skelly Oil Co., (2) president and director of Getty, Inc., before its merger with taxpayer, (3) president and director of Minnehoma,

(4) vice-president, treasurer and director of Pacific Western, and (5) vice-president and director of Mission Corp. The properties of the plaintiff were co-mingled with those of the taxpayer. Mission Corp. owned 59% of the stock of Skelly Oil Co. and, therefore, controlled it; and 1,000,000 shares of Tidewater. Taxpayer owned 670,000 shares, or 67% of Pacific Western and 645,934 shares of Minnehoma, controlling both corporations. Pacific Western owned 641,608 shares of Mission Corp., or 47%; and 400,000 shares of Tidewater. In 1937 the Getty interest obtained control of the Mission Corp. management.

The items in controversy and which defendant used as a basis for the computation of the disputed tax, consisted of (1) interest on German bonds and Pacific Western notes, dividends from Tidewater, and profit from the sale of Tidewater stock and Pacific Western notes, or a total income of $123,495.40 received by Getty, Inc. during 1937, and before it merged with taxpayer; and (2) from the taxpayer for the years 1937-38-39—interest on German bonds and Pacific Western notes, dividends from Tidewater, Pacific Western, Minnehoma, Richfield and profits from the sale of stocks in the following companies: Tidewater, Pacific Western, Richfield, and Pacific Western notes and warrants and pounds sterling.

Plaintiff contends that while the greater amount of the petroleum industry carried on by taxpayer, including production, sales, operation, control and management was conducted in California, the major and principal business of taxpayer was not the petroleum industry but the investment business—taxpayer's activity to increase its interest in the corporations from which the dividends and other profits were received. The value of the intangible assets and the income received therefrom are considerably

larger than those received from the petroleum industry; but in all other respects the greater activity of the taxpayer was in the petroleum industry carried on and conducted in this state. Practically all of the corporate stock owned by taxpayer, and from which the dividends were received, came to it from the merger of the other Getty controlled corporations and the dissolution of the Getty controlled corporation, Minnehoma. Mr. Krug testified that taxpayer was not engaged in the investment business and the record substantiates that statement. Considering the size of taxpayer, its assets and income, a very small amount of stock was purchased and sold during the period involved.

It is most significant that the corporations in which taxpayer held stock and from which it received its income were not totally unrelated to the petroleum business but were reasonably connected therewith. With the exception of Getty Realty Corp., all of the corporations in which taxpayer had an interest were engaged in the petroleum industry, and the management of each corporation was so interwoven that in the final analysis, when taxpayer merged with Pacific Western, in which taxpayer had a controlling interest, Pacific Western succeeded to and controlled all of the corporations involved, including Tidewater.

The only corporation that was not directly connected with the oil industry was Getty Realty Corporation. Early in 1938 taxpayer's president negotiated for the purchase of the Hotel Pierre in New York City. It was subsequently bought for $2,350,000. Title was taken in the name of the realty corporation which had just been formed. The purchase money was advanced by taxpayer

but unquestionably it was money that came to taxpayer from the petroleum industry or which was secured on taxpayer's credit. No income from the realty corporation was received by taxpayer or considered by the defendant in fixing the tax in dispute. The purchase of the Hotel Pierre and the formation of the Getty Realty Corporation is not conclusive, but is only a circumstance to be considered with all the other evidence in determining the issue involved.

Commercial domicile is partially a question of fact and partially a question of law. The rule to be followed is set forth in Southern Pacific Co. v. McColgan, 68 Cal. App. 2d 48, 80, as follows: "The true test must be to consider all the facts relating to the particular corporation, and all the facts relating to the intangibles in question, and to determine from those facts which state, among all the states involved, gives the greatest protection and benefits to the corporation, which state, among all the states involved, from a factual and realistic standpoint is the domicile of the corporation." It seems clear from a consideration of all the evidence and the numerous exhibits that taxpayer was primarily and principally engaged in the petroleum industry and that by far the greater and larger portion of that industry was carried on, conducted, managed, and controlled by taxpayer in the State of California. The fact that taxpayer set up an office in New Jersey to manage its incorporate assets is not sufficient to change its commercial domicile to that state. It was unquestionably beneficial to taxpayer, on account of its investments in the oil industry and in the other corporations also engaged in the oil industry, to merge all of its interests under one head so that corporations that were only producers of petroleum products had a proper and sufficient marketing outlet. It is a rea-

sonable inference that taxpayer's interest in the other corporations was no doubt to advance its own interest in its basic and principal industry, to-wit: petroleum.

It is a material circumstance that Mr. Getty, who individually and as trustee owned all the stock in taxpayer and by reason of such ownership owned taxpayer's interest and investments in Pacific Western, Minnehoma, Tidewater, Mission and Skelly, at all times maintained a legal residence in California. He did spend considerable part of his time in New York where he maintained a large apartment but he never at any time saw fit to change his legal residence to that state, or to any other state; that no state has collected a tax on the income now in dispute; and that by far the greater number of taxpayer's employees and taxpayer's activities, expenditure of funds, preparation and filing of income tax returns, and practically all other activities with the exception of managing its investments were handled, controlled and regulated in this state.

In my opinion the facts parallel those in the Southern Pacific case. Judge Peters wrote an exhaustive opinion in that case, carefully analyzing all the facts and circumstances and the law upon which the Court held that the commercial domicile of the Southern Pacific Co. was in California. There, as here, the Southern Pacific Co. was not incorporated in California (Kentucky) and did no business there. There, as here, it had large investments in corporations outside of this state;—it maintained its officers and its directorate in New York state, where it collected and deposited the dividends that it received; and its income from intangibles far exceeded its income from the railroad business. No petition for hearing was ever applied for or presented to the Supreme Court. That case

is, therefore, controlling. Plaintiff attempts to distinguish that decision but in my opinion has failed to do so. Taxpayer's principal contention is that its major and principal business is investment and not oil, while defendant contends just the opposite:—that taxpayer's principal business is the petroleum industry, and that the investments are so interwoven in corporations similar and related to taxpayer that they are incidental. This presents principally a question of fact. I can see no escape from the ruling in the Southern Pacific case. To me it clearly decides the issue before this Court. I, therefore, conclude that in 1937-38-39, the commercial domicile of taxpayer was in the State of California, being the state in which it received its greatest protection and benefits, and that the tax on the income received from the intangibles for those years was properly levied by the Franchise Tax Board.

Judgment will be for defendant and its counsel will prepare the necessary findings of fact and conclusions of law and judgment.

Dated: February 19, 1953.

GROVER W. BEDEAU,
Judge of the Superior Court.

FILED
JUN 15 1956
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 959 99

PACIFIC WESTERN OIL CORPORATION, a corporation, Successor in Interest to George F. Getty, Inc.,
Appellant,

vs.

FRANCHISE TAX BOARD, STATE OF CALIFORNIA,
Appellee.

Motion to Dismiss

Appeal from the District Court of Appeal of the State of California

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 959

PACIFIC WESTERN OIL CORPORATION, a corporation, Successor in Interest to George F. Getty, Inc.,

Appellant,

vs.

FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

Appellee.

Motion to Dismiss

Appeal from the District Court of Appeal of the State of California

Appellee, Franchise Tax Board of the State of California, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal in the above-entitled case on the grounds:

(a) That the appeal does not present substantial federal questions;

(b) That appellant has included, among the federal questions sought to be raised, a contention which was neither timely, nor properly raised, nor expressly passed upon by the court below.

I. STATEMENT OF THE CASE

A. Introduction.

This case involves an action brought by the appellant, Pacific Western Oil Corporation, to recover California franchise taxes paid by appellant on behalf of George F. Getty, Inc., a Delaware corporation, sometimes referred to herein as the taxpayer. The appellant is the successor in interest of George F. Getty, Inc.

The controversy centers around the propriety of including in the measure of the franchise tax imposed under the California Bank and Corporation Franchise Tax (Calif. Stats. 1929, c. 13, p. 19, as amended; Deering's Gen. Laws, Act 8488) income received in 1937, 1938 and 1939 by George F. Getty, Inc., and by Getty, Inc., from various intangible assets. (Getty, Inc. merged with the taxpayer on August 31, 1937.) The income from the intangibles here in controversy has not been taxed or included in the measure of a tax by any state other than California (R. Tr. 671/9 to 672/8).*

Throughout this litigation, it has been recognized by both the appellant and the appellee that the decisions of this Court in *Wheeling Steel Corp. v. Fox,* 298 U.S. 193, 80 L. Ed. 1143, 56 S. Ct. 773, and *First Bank Stock Corp. v. Minnesota,* 301 U.S. 234, 81 L. Ed. 1061, 57 S. Ct. 677, establish the rule that the state in which a corporation has its "commercial domicile" may tax intangible assets which are related to the business activity carried on at the state of commercial domicile. As appellant pointed out at page 1 of its closing brief in the District Court of Appeal of the State of California "both parties are relying, in the main, upon the same group of cases". Appellant's contention that federal questions are presented by this case is based on the

*R. Tr. refers to the Reporter's Transcript which is part of the record before this Court.

false premise that the findings of fact of the trial court, although supported by substantial evidence, may be disregarded. Thus appellant, depending primarily on testimony given at the trial of these actions in 1951, asserts that the taxpayer did not have its commercial domicile in California, and that in any event it had a commercial domicile in New Jersey with respect to its security holdings. The appellee, on the other hand, relying primarily on contemporaneous documentary materials which were prepared some twelve to fifteen years before the trial, has established to the satisfaction of the trial court and the District Court of Appeal of the State of California that both the taxpayer, George F. Getty, Inc., and Getty, Inc., had their commercial domicile in California, that the securities from which the income here in controversy was received were related to and useful in the oil production activities of these corporations which were carried on in California, and that neither the taxpayer nor Getty, Inc. was engaged in the investment business in New Jersey, or elsewhere. (The opinion of the District Court of Appeal of the State of California in this case is reported under the title *Pacific Western Oil Corporation v. Franchise Tax Board* in 136 Cal. App. 2d 794 and in 289 P.2d 287.)

It seems desirable to consider briefly the nature of the record in this case to indicate the basic information on which the trial court based its findings. This record is quite voluminous. Hundreds of letters and telegrams from the correspondence files of the taxpayer and other corporations were incorporated in the Reporter's Transcript. The minutes of the Board of Directors of George F. Getty, Inc. and Getty, Inc. during the period here in controversy are in evidence. The annual reports for George F. Getty, Inc. for each of the years here in controversy were made part of the

record, as were the annual reports of Pacific Western Oil Corporation for the years in question. A portion of the registration statement which Pacific Western Oil Corporation filed with the Securities and Exchange Commission is included in the record. The exhibits include financial statements of George F. Getty, Inc., and of Getty, Inc. Besides these exhibits introduced at the trial, there were thirty-three exhibits incorporated by reference in plaintiff's complaint.

In addition to the mass of documentary material, there was extensive testimonial evidence given by officers of George F. Getty, Inc. and by the legal counsel for the corporation. The testimony given by these interested witnesses was very frequently in sharp conflict with the documentary evidence prepared contemporaneously with the happening of the events in controversy. For example, it is appellant's position in this case that George F. Getty, Inc. was in the investment business in New Jersey. In support of this contention, Mr. Rowland, the president of the corporation, gave testimony indicating that George F. Getty, Inc. during the period in controversy was purchasing thousands of shares of stock in Tide Water Associated Oil Company (R. Tr. 720/21). An examination of the 1939 annual report of George F. Getty, Inc. discloses that George F. Getty, Inc. did not purchase a single share of Tide Water Associated Oil Company stock during the entire three year period here in question (Pltf. Exhibit No. 22, p. 36). Moreover, although the testimony of the officers of the taxpayer was to the effect that the activities of the California officers were closely supervised by the New Jersey office of the corporation, an examination of the minutes and correspondence of George F. Getty, Inc. discloses that the facts were otherwise. It was the practice of the California officers to act first and then

get ratification by the Board of Directors of their completed actions (Pltf. Exh. 16; Def. Exh. B).

Appellant's "Statement as to Jurisdiction" gives an incomplete and misleading picture as to the facts involved in this case. Appellant not only has failed to mention facts which do not support its position but in addition asserts as established facts appellant's view as to the ultimate facts despite contrary findings by the courts below. For example, contrary to the findings, appellant asserts that the principal office of the taxpayer was in New Jersey, and that the taxpayer conducted an independent investment business there. However, the most surprising statement contained in the "Statement as to Jurisdiction" at page 8 thereof, is that the California officers of the taxpayer, George F. Getty, Inc., did not have authority to acquire new leases, to execute contracts, or to sell oil, except "spot oil". Appellant in making this contention has chosen to ignore not only the documentary evidence, and the testimony of appellant's witnesses, but also the statements made by appellant in briefs filed with the courts below with respect to this matter, (e.g. Appellant's Closing Brief in the District Court of Appeal, p. 9). The record discloses that by resolution of the Board of Directors, the California officers were given extensive power with respect to conducting the affairs of the corporation, including the acquisition of leases, the execution of contracts, the sale of property, the conducting of drilling operations and the sale of all oil and gas (Resolution of March 4, 1937, Pltf. Exh. 16, Minutes for 1937, p. 61). The record also discloses the constant exercise of such powers by the California officers throughout the period here involved (Pltf. Exh. 16; Def. Exh. B).

B. No Federal Question Is Here Presented Under the Facts as Found by the Courts Below.

In view of the numerous conflicts in the evidence in this case, the findings of the trial court are highly significant. Yet, appellant in its "Statement as to Jurisdiction", has failed to discuss or evaluate the detailed findings of fact made by the trial court which the California District Court of Appeal carefully analyzed and found to be supported by substantial evidence. As a result, the constitutional questions which appellant asserts should be passed upon by this Court are hypothetical, being based on appellant's view as to the ultimate facts of this case which are contrary to the trial court's findings of fact.

The trial court made a number of findings of fact in this case (Cl. Tr. 86-102). In addition to making findings as to the truth or falsity of the various allegations of appellant's complaint, the trial court made the following affirmative findings with respect to the taxpayer, George F. Getty, Inc.:

"XXXV.

The three corporations, George F. Getty, Incorporated, George F. Getty Oil Company, and George F. Getty Petroleum Company, which were consolidated to form the taxpayer, George F. Getty, Inc., were primarily interested and engaged in the petroleum business. For many years immediately prior to the consolidation of these corporations by far the greater portion of their business affairs and activities were carried on and managed in and protected by the State of California.

XXXVI.

Throughout the period December 30, 1936, to and including December 31, 1940, the taxpayer, George F. Getty, Inc., was engaged in business in the State of California.

XXXVII.

Throughout the period December 30, 1936, to and including December 31, 1939, the commercial domicile of the taxpayer, George F. Getty, Inc., was in California. Said George F. Getty, Inc. did not have a commercial domicile either in the State of New Jersey, or in the State of Delaware, or in any state other than California at any time during the period December 30, 1936, to and including December 31, 1939.

XXXVIII.

Throughout the period December 30, 1936, to and including December 31, 1939, the principal place of business of George F. Getty, Inc. was in California.

XXXIX.

Throughout the period December 30, 1936, to and including December 31, 1939, among all the states in which it carried on business activities, the taxpayer, George F. Getty, Inc. received the greatest protection and benefits from the State of California.

XL.

Throughout the period December 30, 1936, to and including December 31, 1939, the principal accounting records of the taxpayer, George F. Getty, Inc. were prepared and maintained in the State of California.

XLI.

Throughout the period December 30, 1936, to and including December 31, 1939, the taxpayer, George F. Getty, Inc., was primarily and principally engaged in the petroleum business.

XLII.

The taxpayer, George F. Getty, Inc., was not engaged in the investment business at any time during the

period December 30, 1936, to and including December 31, 1939.

XLIII.

Throughout the period December 30, 1936, to and including December 31, 1939, by far the larger portion of the activities of the taxpayer, George F. Getty, Inc., were carried on, conducted, managed and controlled by the taxpayer in the State of California.

XLIV.

On and after May 1, 1938, the effective date of an agreement with the Skelly Oil Company, the taxpayer, George F. Getty, Inc., had no employees engaged in oil production activities outside of the State of California.

XLV.

The corporations in which the taxpayer, George F. Getty, Inc. held stock (outside of the Getty Realty Co.) were connected with the petroleum business of said taxpayer and these stock holdings were useful to the taxpayer in advancing its petroleum business.

XLVI.

The taxpayer, George F. Getty, Inc., permanently held stock in other corporations in the petroleum industry in order to advance its interests in the petroleum industry and did not acquire stock for the purpose of trading in shares. During the period December 30, 1936, to and including December 31, 1939, no substantial sales of stock were made by the taxpayer, George F. Getty, Inc.

XLVII.

The holding of stock in other corporations engaged in the petroleum business was useful to the taxpayer, George F. Getty, Inc., in providing a proper and sufficient marketing outlet for its petroleum products.

XLVIII.

The activities of the taxpayer, George F. Getty, Inc., in the petroleum industry were not managed or controlled by the New Jersey officers of taxpayer but were managed and controlled by the California officers of the taxpayer.

XLIX.

The taxpayer, George F. Getty, Inc., did not engage in any business activities in the State of Delaware at any time during the period December 30, 1936, to and including December 31, 1939.

L.

Neither Delaware nor New Jersey, nor any other state collected or levied a property tax on the intangibles of the taxpayer, George F. Getty, Inc., the net income from which is involved in this action, nor did any state other than California collect or levy any tax on the income or measured by the income received by the taxpayer, George F. Getty, Inc., from these intangibles."

Similar affirmative findings were made with respect to Getty, Inc. for the period January 1, 1937, to the date of its merger with George F. Getty, Inc. (Findings LI to LXIV).

Appellant expressed its disagreement with all the affirmative findings of the trial court relating to George F. Getty, Inc. except finding XXXVI (taxpayer was engaged in business in California), XLIX (taxpayer did no business in Delaware), and finding L (income from intangibles not taxed by any state other than California). Appellant also challenged all the affirmative findings with respect to Getty, Inc., except findings LI, LXIII, and LXIV which correspond to those findings relating to George F. Getty, Inc., referred to above which appellant was willing to accept.

In discussing the effect to be given to findings of the state courts, this Court has said:

> "* * * Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence."
>
> *Norton Company v. Department of Revenue,* 340 U.S. 534, at 538, 95 L. Ed. 517, at 521, 71 S. Ct. 377, at 380.

> "* * * It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court."
>
> *Stein v. New York,* 346 U.S. 156, at 181, 97 L. Ed. 1523 at 1541, 73 S. Ct. 1077, at 1091.

The facts supporting each of the findings of the trial court were reviewed in great detail at pages 29 through 96 inclusive of the Brief for Respondent filed with the California District Court of Appeal which has been made part of the record in this case. At this time, we will briefly indicate the factual support for several of the key findings in this case, namely, that the commercial domicile of the taxpayer was in California (Finding XXXVII), that the securities from which the income here in controversy was received were permanently held by the taxpayer to advance its interests in the petroleum industry (Finding XLVI), and that the taxpayer was not engaged in the investment business at any time during the period here involved (Finding XLII).

C. The Finding of the Court Below That the Commercial Domicile of the Taxpayer Was in California Throughout the Period Here in Controversy Is Supported by Substantial Evidence.

The finding of the trial court that throughout the period here in controversy the taxpayer, George F. Getty, Inc., had its commercial domicile in California was based on a number of subsidiary findings, including findings that "among all the states in which it carried on business activities, the taxpayer, George F. Getty, Inc., received the greatest protection and benefits from the State of California" (Finding XXXIX), and that "by far the larger portion of the activities of the taxpayer were carried on, conducted, managed and controlled by the taxpayer in the State of California" (Finding XLIII).

The factors relied on by the courts below in determining that the commercial domicile of George F. Getty, Inc., was in California are as follows:

1. Throughout the period here in controversy, between 90 and 99 percent of the employees of the taxpayer performed their services in California.

2. The revenue from sales of gas, oil and gasoline in California were many times greater than the revenue derived from sales in all other states combined.

3. The value of the fixed assets of the taxpayer in California were several times the value of fixed assets in other states.

4. The day to day management of the oil, gas and gasoline production and sales activities of the taxpayer was carried on in California.

5. Payments in connection with the maintenance and operation of plaintiff's petroleum business were made from its Los Angeles office, including payrolls.

6. The principal accounting records of the taxpayer were kept in California.

7. The income from intangibles here in controversy was not taxed by any state other than California.

8. The taxpayer filed its federal income tax returns in Los Angeles. Such returns, under the provisions of the Internal Revenue Code, must be filed in the district where the taxpayer has its principal place of business, or principal office, or agency.

9. Mr. J. Paul Getty, who held all of the shares of the corporation either individually or as a trustee, had his legal domicile in California during the years 1937, 1938 and 1939.

10. The taxpayer did not carry on any business activity in Delaware, the state in which it was incorporated.

11. The predecessor corporations which were consolidated to form the taxpayer were managed and controlled in California and their principal activities were carried on in this state.

12. The directors of the taxpayer followed the procedure of ratifying completed acts of the California officers of the corporation with respect to oil production activities rather than directing the California officers in advance with respect to the procedures they should follow.

In addition, the documentary evidence in this case shows that the New Jersey officers of the taxpayer did not exercise independent judgment on matters of any consequence relating either to the securities of the taxpayer or to its oil production activity. Important decisions on the operations of the company were made either by the California officers of the taxpayer or by Mr. J. Paul Getty, the sole shareholder who maintained his legal residence in California throughout the taxable period here involved. Thus, the record shows that when Mr. Getty was not in New York, the New Jersey officers wired the California officers for advice with respect to the sale of securities (R. Tr. 791) as well as with respect

to the selection of officers of the subsidiaries (R. Tr. 792). Moreover, the New Jersey officers informed the California officers that it was unnecessary to forward reports to the New Jersey office when Mr. Getty was in Los Angeles (R. Tr. 774).

In 1937 George F. Getty, Inc., had 496 employees of whom an average of 463 were employed in California; out of a total payroll of $1,066,638.54, California employees received $993,933.72 (1937 Annual Report of George F. Getty, Inc. p. 9, Pltf. Ex. 20). After April 26, 1938, the mid-continental properties of George F. Getty, Inc., were operated by Skelly Oil Company and all of the 329 employees on the field payroll of George F. Getty, Inc., were employed in the California fields (Annual Report of George F. Getty, Inc., for 1938, p. 8e, Pltf. Ex. 21).

Mr. Emil Kluth of the Los Angeles office of the taxpayer had formerly been president of and had actively supervised the oil production activities of the predecessor corporations and of Getty, Inc. (R. Tr. 750 to 751). As Vice President of the taxpayer, he continued in charge of the oil field operations in the State of California and handled exploration for oil in California, together with the sale of crude oil (R. Tr. 752/9). The acquisition of oil leases was handled through the Land Department of the taxpayer which was located in Los Angeles and was under the supervision of Mr. Kluth (R. Tr. 753/23). Neither Mr. Rowland nor Mr. Krug, the officers of the taxpayer in the New Jersey office, had extensive knowledge in the field of exploration for, and production of oil and gas (R. Tr. 701/10, 671/5).

At the Los Angeles office of George F. Getty, Inc. the assistant secretary of that company, Mr. Fero Williams, and five other employees, were engaged in keeping the accounting records of George F. Getty, Inc. (Annual Report of 1938, p. 86, Pltf. Ex. 21, R. Tr. 680).

The general ledger of the company and the detailed accounting records with relation to oil and gas production were kept at the Los Angeles office of George F. Getty, Inc. The financial and operating statements of George F. Getty, Inc., were prepared in the Los Angeles office and forwarded to New Jersey (R. Tr. 682/1).

The annual reports of George F. Getty, Inc., were prepared by Mr. Fero Williams in the Los Angeles office of George F. Getty, Inc. (R. Tr. 670/14). Each of the offices of George F. Getty, Inc., kept its own records of cash, receipts and disbursements which were sent to Los Angeles to be collated and entered into the final operating statement of George F. Getty, Inc. (R. Tr. 681/2).

The accounting records kept by the New Jersey office of George F. Getty, Inc. consisted of the cash receipts and disbursements book, the stock records of the company, and a record of activities relating to the investments and financing of the company (R. Tr. 681/17).

There actually were only four employees of the taxpayer at the New Jersey office of that company. These were Mr. Rowland, Mr. Krug and two secretaries. These employees in the New Jersey office worked for a number of other corporations as well as George F. Getty, Inc. (R. Tr. 678-679). In 1938, Mr. Rowland, who was president of the taxpayer, received an annual salary of $255 from the taxpayer, whereas Mr. Kluth, a vice president in California, whom the correspondence and corporation minutes show made the important decisions with respect to oil production operations of the taxpayer, received an annual salary of $5650 or approximately 20 times as much as Mr. Rowland (Compiled Registration Statement filed by Pacific Western Oil Corporation with the Securities and Exchange Commission in 1939, Cl. Tr. 41-42).

Additional facts supporting the findings of the trial court with respect to the commercial domicile of the taxpayer and the management of taxpayer's affairs by the California officers are listed below:

1. The receipts of the taxpayer arising from its oil operations were deposited in its account at the Security-First National Bank of Los Angeles (Pltf. Ex. 21, p. 12; Pltf. Ex. 22, p. 24).

2. Payment for salaries and the expense of oil operations of the taxpayer were made from the account of the taxpayer at the Security-First National Bank of Los Angeles (Pltf. Ex. 21, p. 12a; Pltf. Ex. 22, p. 24a; Def. Ex. B, R. Tr. 767/22).

3. The California officers of the corporation were authorized to draw checks on the account of the taxpayer, George F. Getty, Inc., in the Security-First National Bank of Los Angeles. Neither the New Jersey officers of the corporation nor Mr. J. Paul Getty, was authorized to draw checks on this account (Pltf. Ex. 20, p. 92; Pltf. Ex. 21, p. 73; Pltf. Ex. 22, p. 15).

4. By a resolution of the board of directors of the taxpayer passed on December 2, 1937, the California officers of George F. Getty, Inc. were authorized to manage and conduct the business affairs of the corporation in the Mid-continent and Gulf Coast states (Minutes of George F. Getty, Inc. for 1937, page 139, Pltf. Ex. 16).

5. On April 26, 1938, an agreement was made with Skelly Oil Company whereby Skelly Oil Company assumed the management and operations of the oil and gas producing properties of George F. Getty, Inc. in the Mid-continent area comprising the states of Kansas, Oklahoma, New Mexico, Texas, Arkansas and Louisiana. This agreement became effective May 1, 1938. This agreement was accepted

and confirmed on behalf of George F. Getty, Inc., by Mr. Emil Kluth of the Los Angeles office of the taxpayer. Receipts from the Mid-continent operations were deposited in the account of George F. Getty, Inc. at the Security-First National Bank of Los Angeles. (Pltf. Ex. 21, p. 12; Pltf. Ex. 22, p. 24.) Payment to Skelly Oil Company was made by checks drawn on the account of George F. Getty, Inc., at the Security-First National Bank of Los Angeles (Pltf. Ex. 21, p. 12a; Pltf. Ex. 22, p. 24a).

D. The Securities From Which the Income Here Involved Was Received Were Permanently Held by the Taxpayer to Advance Its Interests in the Petroleum Industry.

The finding of the court below, that the securities from which the income here in controversy was received were permanently held by the taxpayer, George F. Getty, Inc., to advance its interests in the petroleum industry, is supported by substantial evidence.

Mr. Rowland, the president of George F. Getty, Inc., testified that the investment in securities of other companies in the petroleum industry was motivated by the fact that "through economic conditions it became apparent we could acquire reserves in the ground for less by buying indirect reserves through securities than we could by going out and developing properties in direct costs" (R. Tr. 689/18). The stock holdings of the taxpayer were primarily in companies engaged in the petroleum industry, namely, Pacific Western Oil Corporation and Tide Water Associated Oil Company. These holdings were permanent investments of the taxpayer which remained virtually static during the period here involved.

Nearly all of the securities from which the income here in controversy was received were acquired by the taxpayer

from predecessor corporations which had been managed and controlled in California for many years prior to the formation of the taxpayer. Thus, on December 31, 1939, the last day of the taxable period here involved, the taxpayer held 372,454 shares of Tide Water Associated Oil Company stock, all of which were received from predecessor corporations or from the merger with Getty, Inc. on August 31, 1937. All of the shares of Tide Water stock had been purchased prior to June 26, 1935. Of the 679,019 shares of Pacific Western Oil Corporation stock held by the taxpayer on December 31, 1939, all but 6200 shares had been received from predecessor corporations or as distributions on the dissolution of controlled corporations. With the exception of the 6200 shares which had been purchased by the taxpayer between June 7, 1939, and August 31, 1939, all of the shares of Pacific Western Oil Corporation stock had been purchased prior to March 20, 1935 (Annual Report of Taxpayer for 1939, pp. 33-38 inclusive).

Appellant in referring to the sales of Tide Water stock made during the period here in controversy fails to note that well over half of the shares of Tide Water Associated Oil Company stock sold during the period in question was sold to the Mission Corporation, a subsidiary of Pacific Western Oil Corporation, and part of the J. Paul Getty sphere of influence (Pltf. Exhs. 20, 21, 22).

The ownership of the stock in Tide Water Associated Oil Company and in Pacific Western Oil Corporation was directly connected with the oil operations of taxpayer. During at least part of the period here in controversy, George F. Getty, Inc. and Pacific Western Oil Corporation acquired all oil leases in California jointly on a 50-50 basis (Joint Exhibit 3, p. 9) thus sharing the risk of loss and permitting more extensive exploration for oil. Moreover, all of Pacific

Western Oil Corporation's oil properties located in California were operated by the taxpayer and charges made to Pacific Western (Annual Report for 1938, p. 8d). The economies resulting in joint operations and the splitting of costs are readily apparent.

At page 200 of the Annual Report of George F. Getty, Inc. for 1939 (Pltfs. Exhibit 22), it is stated that it was becoming increasingly difficult to dispose of crude oil. At page 210 of this report, it is shown that the taxpayer was able to sell approximately 3,000,000 barrels of oil, or a little less than 1/5 of its total production, to Tide Water Associated Oil Company in 1939. It would seem that taxpayer's interest in gaining a more powerful voice in the affairs of Tide Water was to assure a greater volume of oil sales to that company.

The taxpayer's holdings of Pacific Western stock were also of value in working out an arrangement with Skelly Oil Company for the operation by Skelly of the taxpayer's property in the Mid-Continental area. Skelly Oil Company was one of the corporations which was indirectly controlled by Pacific Western Oil Company through its holdings in the Mission Corporation. The arrangement with Skelly Oil Company allowed the taxpayer to concentrate its oil production efforts in California and unquestionably reduced the overhead costs of the taxpayer.

The Pacific Western notes held by the taxpayer and by Getty, Inc. while not a permanent investment to the same extent as the stock of the company, were nevertheless held for a considerable period of time. Most of these notes had been acquired by predecessor corporations prior to the formation of George F. Getty, Inc. (Pltf. Ex. 20, pp. 3; 21, p. 3). They represented investments in a controlled corporation which was actively engaged in oil production. Thus,

they represented a plan of inter-company financing rather than a speculative adventure on the part of the taxpayer.

The presumption that all the property of a corporation, including its securities, is useful in its business was recognized in *Ford Motor Company v. Clark* (5th Circuit), 100 Fed. 2d 515, aff. 308 U.S. 331. In the *Ford* case, the court pointed out that the securities of a company can readily be used as a means of raising working capital (100 Fed. 2d at 518). This certainly proved true in the instant case since the funds of George F. Getty, Inc. were transferred from time to time from banks in New York City to take care of the expenses of carrying on the oil operations of the company in California (Tr. 722-723, Pltf. Exh. 21, p. 12, Pltf. Exh. 22, p. 24). The funds so transferred were apparently derived from dividends, interest or the sale of securities.

E. The Taxpayer Was Not Engaged in the Investment Business in New Jersey or Elsewhere.

The finding of the trial court that neither George F. Getty nor Getty, Inc. was engaged in the investment business either in the New Jersey office or elsewhere is supported by substantial evidence.

At page 1 of the Annual Report of George F. Getty, Inc., for the year 1939 (Pltf. Exh. 22), the statement is made:

> "The business of the company is considered to be divided between (a) Direct Operations in the oil business and (b) all other business, including indirect oil operations through stock ownership."

This Report also states at page 1:

> "The principal business transactions for the year 1939 were in connection with direct oil operations— * * *"

Moreover, in a letter dated October 27, 1937, written to the Securities and Exchange Commission, the following statement was made:

> "* * * Getty, Inc. and George F. Getty Oil Company were not formed and used primarily as a medium for investment as such companies had other substantial business interests. George F. Getty, Inc., the surviving corporation in the consolidation and merger hereinbefore mentioned was not formed primarily as an investment medium but has other large interests in the oil business and derives a major portion of its income from such interests. * * *" (R. Tr. 353, 354/20 to 355/2)

As noted above, the trial court found the securities held by the taxpayer and Getty, Inc. were primarily in corporations engaged in the petroleum industry and were held to advance the interests of the taxpayer and of Getty, Inc. in the petroleum business. It has also been shown that taxpayer's holdings of stock in companies from which most of the income here involved was received remained virtually static during the period here in controversy. This evidence refutes appellant's contention that these securities were part of an investment business, separate and apart from the taxpayer's operations in the petroleum business.

It is to be noted that the dividend income of George F. Getty, Inc., declined from $847,178.80 in 1937 to $569,570.80 in 1939, while the income from interest decreased from $113,406.12 in 1937 to $53 554.28 in 1939, and the income from profits on sales of intangibles declined from $177,976.19 in 1937 to $7,024.18 in 1939. It is apparent that the contention of appellant that the New Jersey office of the taxpayer was actively engaged in the investment business is not reflected in a salutary effect on the income from investments. With respect to the stock of Pacific Western Oil Corporation and Tide Water Associated Oil Company,

George F. Getty, Inc. was merely a passive recipient of dividends. Appellant has failed to show that the dividend income it received was in any manner affected by the activities of the New Jersey office. The same is true as to Getty, Inc.

Appellant's theory that George F. Getty, Inc. was engaged in an independent investment business is based on an attempt to ascribe to the taxpayer activities performed by other corporations in which George F. Getty, Inc. held shares. For example, appellant has attempted to disregard the corporate entity of Pacific Western Oil Corporation and ascribe to George F. Getty, Inc. activities actually performed by officers of Pacific Western Oil Corporatiion on its own behalf, such as activities performed with relation to the Skelly Oil Company. George F. Getty, Inc. did not own a single share in the Skelly Corporation. There is no basis for disregarding the corporate entity of Pacific Western Oil Corporation which had approximately 2500 stockholders during the period here in controversy (11th Annual Report of Pacific Western Oil Corporation, p. 9, Joint Exhibit 3). Pacific Western Oil Corporation had independent directors (R. Tr. 812/1) and its stock was traded on a New York Stock Exchange and the San Francisco Curb Exchange. It held valuable oil properties in California and elsewhere and had fixed assets of over $8,000,000 (Ninth Annual Report of Pacific Western Oil Corporation, p. 10, Joint Exhibit 1).

Appellant refers to the fight for the control of Tide Water Associated Oil Company as being carried on by the New Jersey office of George F. Getty, Inc. It appears from the record, however, that Pacific Western Oil Corporation held directly or indirectly approximately four times as many shares in Tide Water Associated Oil Company as George F. Getty, Inc. (R. Tr. 675-676). The record also shows that

Mr. Rowland, who testified that he carried on activities with respect to gaining a voice in the affairs of Tide Water Associated Oil Company, received as vice president and director of Pacific Western Oil Corporation $6,415, whereas he received only $255 a year from George F. Getty, Inc. It would appear that the ratio between the salary paid to Mr. Rowland by Pacific Western Oil Corporation and George F. Getty, Inc. would be a reasonably accurate gauge of the proportion of his time devoted to the affairs of each of these companies.

Although it may be true, as asserted by appellant, that the activities of protecting and controlling investments may be the predominant activity of a corporation, it is necessary to examine all the facts in order to ascertain if that is true with respect to a particular corporation. The facts in the instant case show that the taxpayer and Getty, Inc. held the securities which produced the revenue here involved to advance their interests in the petroleum industry and that they were the passive recipients of dividends from these permanent investments.

II. THERE ARE NO SUBSTANTIAL FEDERAL QUESTIONS PRESENTED BY THIS CASE.

A. Under the Holdings of This Court in Wheeling Steel Corp. v. Fox, 298 U.S. 193, and First Bank Stock Corp. v. Minnesota, 301 U.S. 234, the Imposition of the California Franchise Tax in the Instant Case Does Not Violate the Due Process Clause of the Fourteenth Amendment Since the Taxpayer, George F. Getty, Inc., and Getty, Inc., Both Had Their Commercial Domicile in California and Since the Securities From Which the Income Here in Controversy Was Received Were Related to and Useful in the Oil Production Activities Carried on by Them in California.

The concept of a "commerical domicile" as a substitute for a legal domicile was recognized by this court in *Wheel-*

ing Steel Corp. v. Fox, 298 U.S. 193, 80 L. Ed. 1143, 56 S. Ct. 773, and in *First Bank Stock Corp. v. Minnesota,* 301 U.S. 234, 81 L. Ed. 1061, 57 S. Ct. 677. In both of these cases, this Court held that the state of commercial domicile had the power to impose a tax on the intangible assets of a corporation. An excellent statement with respect to this matter is found in *First Bank Stock Corp. v. Minnesota, supra,* where the court said:

> "The rule that property is subject to taxation at its situs, within the territorial jurisdiction of the taxing state, readily understood and applied with respect to tangibles, is in itself meaningless when applied to intangibles which, since they are without physical characteristics, can have no location in space. See *Wheeling Steel Corp. v. Fox, supra,* 209. The resort to a fiction by the attribution of a tax situs to an intangible is only a means of symbolizing, without fully revealing, those considerations which are persuasive grounds for deciding that a particular place is appropriate for the imposition of the tax. *Mobilia sequuntur personam,* which has won unqualified acceptance when applied to the taxation of intangibles, *Blodgett v. Silberman,* 277 U.S. 1, 9-10, states a rule without disclosing the reasons for it. But we have recently had occasion to point out that enjoyment by the resident of a state of the protection of its laws is inseparable from responsibility for sharing the costs of its government, and that a tax measured by the value of rights protected is but an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. See *New York ex rel. Cohn v. Graves,* 300 U.S. 308." (301 U.S. 234, at 240)

Wheeling Steel Corp. v. Fox, supra, presented the question of the power of West Virginia to tax a foreign corporation on its bank accounts on deposit in other states in the sum of approximately $1,500,000 and on accounts and

notes receivable totaling approximately $2,000,000 of which $374,410.42, or about one fifth was receivable for goods sold, manufactured in and shipped from West Virginia. The state court had permitted the deduction of $2[illegible]0,133.42 of intangible property which had been assessed by Ohio. This Court upheld the validity of the taxation of the bank accounts and the accounts and notes receivable by West Virginia on the ground that the corporation had its commercial domicile in West Virginia and that the intangibles were related to the activities of the corporation carried on in that state.

The California courts have made a painstaking analysis of the constitutional limitations and restrictions on the taxing power of the state of commercial domicile in the light of the decisions of this Court referred to above. In *Southern Pacific Company v. McColgan,* 68 Cal. App. 2d 48, 156 P.2d 81, which is relied upon by the District Court of Appeal in its opinion in the instant case, the court was called upon to consider the validity of the application of the California Bank and Corporation Franchise Tax, the taxing statute involved in this case, to dividends received by a Kentucky corporation, the Southern Pacific Company. The Court upheld the validity of the tax on the ground that the commerical domicile of the corporation was in California and that the securities from which the income in controversy was received were useful to the railroad company in carrying on its railroad operations. In the courts below, the appellant accepted the decision in *Southern Pacific Company v. McColgan,* supra, as a correct statement of the law with respect to the taxing power of the state of commercial domicile.

The findings of the trial court in the instant case place it squarely under the holding in *Southern Pacific Company*

v. McColgan, supra, as well as under the holdings of this court in *Wheeling Steel Corporation v. Fox,* 298 U.S. 193, 80 L. Ed. 1143, 56 S. Ct. 773 and *First Bank Stock Corporation v. Minnesota,* 301 U.S. 234, 81 L. Ed. 1061, 57 S. Ct. 677. It is clear therefore that the imposition of the tax here in controversy satisfies the requirements of due process, and that no substantial federal question is presented with respect to this matter.

8. Appellant in Attempting to Present a Federal Question Has Misstated the Holdings of the Courts Below.

Appellant in attempting to show that there is a substantial federal question here involved makes the following statement at page 23 of its "Statement as to Jurisdiction":

> "The courts below assumed incorrectly that if the oil producing division had its commercial domicile in California, it automatically followed that all income from intangibles would be taxable in California, for the assumed reason that a corporation can have only one commercial domicile."

Appellant having attributed this alleged holding to the courts below proceeds to attack it as being an incorrect statement of the law. Unfortunately, for the contention of appellant, the decisions of the courts below clearly show that these courts found not only that a taxpayer had its commercial domicile in California, but also that the securities from which the income here in controversy was received were related to and useful in its oil production activities and that the taxpayer was not engaged in the investment business in New Jersey or elsewhere.

With respect to this matter, the trial court said in its memorandum opinion (Appendix C of "Statement as to Jurisdiction," p. 25-26):

"It is most significant that the corporation in which taxpayer held stock and from which it received its income were not totally unrelated to the petroleum business but were reasonably connected therewith. With the exception of Getty Realty Corp., all of the corporations in which taxpayer had an interest were engaged in the petroleum industry, and the management of each corporation was so interwoven that in the final analysis, when taxpayer merged with Pacific Western, in which taxpayer had a controlling interest, Pacific Western succeeded to and controlled all of the corporations involved, including Tidewater."

* * * * * * *

"* * * It was unquestionably beneficial to taxpayer, on account of its investments in the oil industry and in the other corporations also engaged in the oil industry, to merge all of its interests under one head so that corporations that were only producers of petroleum products had a proper and sufficient marketing outlet. It is a reasonable inference that taxpayer's interest in the other corporations was no doubt to advance its own interest in its basic and principal industry, towit: petroleum."

In like manner, the District Court of Appeal, in sustaining the validity of the tax, made reference to the following findings of the trial court:

"(1) The corporations in which the taxpayer held stock (outside of the Getty Realty Co.) were connected with the petroleum business of said taxpayer and these stockholdings were useful to the taxpayer in advancing its petroleum business.

"(2) The taxpayer permanently held stock in other corporations in the petroleum industry in order to advance its interests in the petroleum industry and did not acquire stock for the purpose of trading in shares; no substantial sales of stock were made by the taxpayer.

"(3) The holding of stock in other corporations engaged in the petroleum business was useful to the taxpayer in providing a proper and sufficient marketing outlet for its petroleum products." (136 Cal. App. 2d 794 at 805, 289 P.2d 287 at 293)

The trial court made similar findings with respect to Getty, Inc. It is thus apparent that the courts below sustained the validity of the tax here involved because they found not only that George F. Getty, Inc. and Getty, Inc. had their commercial domicile in California but, in addition, that the security holdings of these corporations were related to and useful in the oil production activities carried on by them in California.

C. The Imposition of the Tax Here in Controversy Does Not Contravene the Commerce Clause of the United States Constitution.

Appellant asserts that the taxation of income from intangibles not related to local business contravenes the Commerce Clause of the United States Constitution, citing *International Paper Co. v. Massachusetts*, 246 U.S. 135, 62 L. Ed. 624, 38 S. Ct. 92. This legal proposition has, however, no bearing on the issues presented by this case since, as shown by the prior discussion, the income taxed in this case was received from intangibles which were related to the oil production activities of the taxpayer and of Getty, Inc. which activities were carried on in California, the state of commercial domicile. That the imposition of a tax under such circumstances does not violate either the due process clause or the commerce clause of the United States Constitution is established by the holdings of this Court in *Wheeling Steel Corp. v. Fox*, 298 U.S. 193, 80 L. Ed. 1143, 56 S. Ct. 773, *First Bank Stock Co. v. Minnesota*, 301 U.S. 234, 81 L. Ed. 1061, 57 S. Ct. 677, *Southern Gas Corp. v. Alabama*,

301 U.S. 48, 81 L. Ed. 970, 57 S. Ct. 696, and *Matson Navigation Company, et al. v. State Board of Equalization*, 297 U.S. 441, 80 L. Ed. 791, 56 S. Ct. 553.

D. Appellant's Contention That the Imposition of the Tax Here in Controversy Violates the Equal Protection Clause of the United States Constitution Was Not Raised by Appellant in or Passed on by the Courts Below. Moreover, This Contention Is Completely Lacking in Merit.

In Question 5 set forth in the "Statement as to Jurisdiction", it is stated that this case presents the question of whether the imposition of the California franchise tax on the taxpayer, George F. Getty, Inc., deprived the taxpayer of the equal protection of the law in violation of the Fourteenth Amendment of the United States Constitution. Appellant asserts that this contention was raised in the courts below. The equal protection clause of the United States Constitution, however, was not mentioned in Appellant's Opening Brief, or Appellant's Closing brief filed with the California District Court of Appeal, nor was it mentioned in the Appellant's Petition for Rehearing by the District Court of Appeal, nor in Appellant's Petition for a Hearing by the Supreme Court of the State of California. As a consequence, the equal protection clause of the Fourteenth Amendment, not having been raised by appellant, was not considered or passed upon by the District Court of Appeal or the Supreme Court of California.

Moreover, in its "Statement as to Jurisdiction", appellant does not discuss the equal protection clause of the United States Constitution, or explain why appellant feels that this provision has been violated. Since there is not the slightest indication in the record of this case that the treatment of appellant was in any manner different from

that afforded to any other corporation similarly situated, its contention that the equal protection clause of the United States Constitution has been violated is obviously unmeritorious.

CONCLUSION

It is respectfully submitted that this case presents no substantial federal question for the decision of this Court and that the appeal should be dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1956.

No. 99.

PACIFIC WESTERN OIL CORPORATION, a corporation, Successor in Interest to George F. Getty, Inc.,

Appellant,

vs.

FRANCHISE TAX BOARD, State of California,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

Appellant, PACIFIC WESTERN OIL CORPORATION, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, herewith submits its Brief in Opposition to the Motion to Dismiss.

Since the Notice of Appeal was filed, on March 23, 1956 Appellant's name has been changed to Getty Oil Co.

I.

Introduction.

The Motion to Dismiss is predicated upon the assertion that this Court should accept without reexamination the findings of fact made by the trial court. Appellee thus seeks to avoid plenary consideration of the Constitutional issues here presented. Appellee does not claim that novel issues of taxation are lacking; or that the issues are not

of universal importance to the diversified national corporations of today; or that there is absent a need for guidance by this Court. Rather, its approach is that there exists no valid reason for reviewing the findings by reexamining the undisputed evidence.

Appellee recognizes that this Court is free to examine the entire record where constitutional rights and immunities are presented, and that findings of fact, when not supported by substantial evidence can be disregarded. (Motion p. 10.) This Court has said:

> "In all cases coming to us from a state court, we pay great deference to its determination of fact. But when the existence of an asserted Federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained" (*Hooven & Allison Company v. Evatt,* 324 U. S. 652, at 659, 89 L. Ed. 1252, at 1260, 15 S. Ct. 870, at 874).

The Motion to Dismiss, therefore, raises squarely the question whether this Court should review the findings and reexamine the record. Because the concepts regarding commercial domicile and taxability of income from intangibles involve intermingled questions of fact and law, such a reexamination in the light of the Federal rights denied is warranted.

Appellee argues that if the findings be accepted, no federal question exists. The findings are very broad. They are the findings prepared by appellee and submitted

to the trial court, and endorsed by it without any changes whatsoever, in spite of objections and written argument by appellant. Of utmost importance is that appellee does not dispute the existence of a federal question if the record be examined.

In support of its argument that this Court should not examine the record appellee asserts that there were numerous conflicts in the evidence and, therefore, the findings are significant (Motion p. 6). The record is large and bulky, but this is because of the number and size of exhibits. It is essentially an uncontradicted record. All the testimony came from appellant's officers and counsel; all the documents came from appellant's files and records. The conflict results not from the testimony and evidence, but rather from the inferences and conclusions. We do not dispute the evidentiary facts appellee has set forth in its Motion (pp. 11-16). Nor does appellee dispute the evidentiary facts set forth in the Statement as to Jurisdiction (pp. 6-13). Furthermore, as the briefs in the courts below illustrate, there has been no disagreement concerning the facts themselves. The District Court of Appeal stated in its opinion in this case:

> "There is no substantial disagreement between the parties hereto as to the existence of the foregoing facts. The controversy centers around inferences which may be drawn from those facts." (Statement as to Jurisdiction, Appendix A, p. 10.)

The trial court found[1] from the evidentiary facts that:

1. The taxpayer's "commercial domicile" was in California.

---

[1]The District Court of Appeal upheld the conclusions of the trial court but did not profess to weigh the undisputed facts.

2. That taxpayer did not have a commercial domicile in New Jersey.
3. The intangibles in question were related to and useful in taxpayer's California activities.

Appellant has sought review in this Court because the evidentiary facts do not give substantial support to those findings. The determination of commercial domicile depends upon an analysis of the relevant factors. What factors are relevant and what weight should be given to certain of them is in dispute here. No dispute exists, however, regarding the evidentiary facts themselves.

The issue here is a Constitutional one. The judgment below results in taxation measured by certain income. The facts disclose that such income was not subject to taxation because it is beyond the Constitutional limits of the taxing authority. The statute under which the tax was imposed is, therefore, unconstitutional as applied to this income. Rather than to accept without question the findings of the trial court which constitute a more or less perfunctory endorsement of findings prepared by appellee to fortify the trial court's decision, this Court should examine the facts themselves. Such examination will demonstrate that the manner in which the intangibles were used by the taxpayer had no relationship whatsoever to the drilling of oil wells and the selling of oil products in California.

II.

Support in the Record for the Finding of a Commercial Domicile in California Does Not Aid the Motion to Dismiss.

Appellee recites at length the facts claimed to support the trial court finding that the commercial domicile of the taxpayer was in California (Motion, pp. 11-16).

Although the record shows that the taxpayer engaged in significant activities in California, although it can be argued that such activities were under the direction and control of the officers in the Los Angeles office, the existence of one principal office in California, or even the existence of one commercial domicile there, is not the crux of this appeal. Appellee places special emphasis on the California, activities. However, those activities related only to drilling for and production of oil and the sale of oil products. Drilling and exploration of underground oil reserves require substantial payrolls and substantial expenditures. The extent of these activities, however, no matter how great, does not negate the existence of other enterprises, nor does it support of itself an inference that all other activities are part thereof. The record here shows another separate business, which was carried on in New Jersey, far larger in terms of investment and revenue, although smaller in terms of personnel and bookkeeping.

Even if it be the law that a corporation can have only one commercial domicile no matter what the diversification of its business, the record reveals that the most significant business activities of appellant were carried on

in New Jersey and that New Jersey rather than California should be that domicile. We submit, however, that there can be as many commercial domiciles as there are separate businesses. No court has so held; none has held to the contrary, but such a proposition is the logical result of application of the reasons behind the rule.

III.

The Taxpayer Conducted an Active, Aggressive and Separate Investment Business in New Jersey.

Appellee puts the question well when on page 22 of the Motion it asserts:

> "Although it may be true, as asserted by appellant, that the activities of protecting and controlling investments may be the predominant activity of a corporation, it is necessary to examine all the facts in order to ascertain if that is true with respect to a particular corporation . . ."

The facts relating to the taxpayer's investment activity are set forth completely in the Statement as to Jurisdiction, at pages 8-12. That discussion shows a portfolio valued at more than $28,000,000; sales, purchases and loans of nearly $7,000,000 during the three years and income in excess of $2,700,000. Appellee contends the supervision and management of these changing investments did not constitute a separate business. Yet appellee refers to the fact that the New Jersey office kept its own records showing cash receipts and disbursements, "and a record of activities relating to the investments and financing of the company" (Motion, p. 14). Appellee further recognizes and concedes the dual nature of taxpayer's business. It (1) asserts that Mr. Kluth "made the important decisions with respect to the oil production operations of the tax-

payer" (Motion, p. 14), (2) recognizes that deposits in Los Angeles bank and payments therefrom arose from taxpayer's "oil operations", (3) makes specific reference to the following three items of evidence:

a. "Through economic conditions, it became apparent that we should acquire reserves in the ground for less by buying indirect reserves through securities than we could by going out and developing properties in direct costs" (Motion, p. 16, statement of Mr. Rowland, President of the taxpayer, as to why investment was made in securities).

b. "The business of the company is considered to be divided between (a) direct operations in the oil business and (b) all other business, including indirect oil operations through stock ownership" (Motion, p. 19, from the annual report of the taxpayer for the year 1939 [Pltf. Ex. 22]).

c. "George F. Getty, Inc., the surviving corporation, in the consolidation and merger hereinbefore mentioned, was not formed primarily as an investment medium, but has other large interests in the oil business and derives a major portion of its income from such interests. . . ." (Motion, p. 20, letter to Securities and Exchange Commission).

The efforts by appellee to belittle the investment activities of the taxpayer are contained in the Motion at pages 19 through 22. These efforts, rather than citing relevant facts from the record in the case, argue that certain inferences should be made. Appellee asks this Court to conclude that because income from investments declined from $1,138,561.11 in 1937 to $630,149.26 in 1939, therefore, the taxpayer was not actively engaged in the investment business. The true standard, however, for determining the extent of activities is to consider not only

the income, which was substantial, but also the acquisitions and sales and the management and supervision undertaken as the result of the investments. The record shows that sales and purchases of securities amounted to approximately $7,000,000, and that the investment portfolio received the active and vigorous supervision and management by the officers of the company in the New Jersey office. For example, it was from that office that the taxpayer and Pacific Western Oil Corporation, together developed and attempted to carry out in the East a plan for the acquisition of control in Tide Water Associated Oil Company, and for the control of Mission Corporation. The proration of salaries is not an accurate guide for determining the extent of interest of the corporations involved in this plan. Rather, the benefit which was sought is the more reasonable standard for determining whether the activities were bona fide and whether they were significant. The taxpayer's direct interest in Pacific Western Oil Corporation gave it an indirect interest in Tide Water Associated Oil Company amounting to more than 1,200,000 shares, in addition to the 404,854 shares owned outright by the taxpayer.

The portion of the Motion devoted to the taxpayer's investment business does not, when compared with the outline of the taxpayer's activities in connection with its investments as set forth in the Statement as to Jurisdiction, show a passive security holding. Rather it shows an aggressive active business of making the most of the securities, by income and capital appreciation, by purchases and sales, and by exercise of supervision and management.

As pointed out in the Statement as to Jurisdiction, the management of this security portfolio involved far more

than routine transactions relating to purchases, sales and receipt of income. The securities were used for the very purpose of exerting control of the management of companies in which the taxpayer had direct or indirect investment interests.

Nowhere is the record more emphatic than in the testimony of the man who was taxpayer's president during the period in question. He was asked and answered as follows [Rep. Tr. 701-702]:

> "Q. Now, turning to the oil business, how important relatively did you as president of George F. Getty, Inc. consider that investment?
>
> A. Let's first go back to my background. It is true that I have completed two years at U. C. L. A. studying petroleum geology. It is also true that I have completed several extension courses, finance and business administration.
>
> I know directly that I was hired not because of my oil background but rather because of my financial and business administration background. That was impressed upon me by Mr. Getty when I became associated with George F. Getty, Inc., accordingly, I must say that I agreed with that viewpoint because the investments of George F. Getty, Inc. were so heavy in favor of securities and the securities were a vehicle to an end of acquiring control of Tide Water, Skelly Oil and our other investments that I felt that was the most important phase of our business.
>
> Q. Did you consider the investment business as incidental to the actual oil operating business of George F. Getty, Inc. during those years?
>
> A. On the contrary, I felt that the oil business was incidental to the investment business, certainly the assets of, the dollars and cents involved in investments overshadowed that of the oil business."

IV.

There Was No Connection Between Taxpayer's Investment Business and the Production of Oil in California.

In the lower courts appellee contended that the intangibles were related to and a part of the business conducted by the taxpayer in California. Appellee concedes at pages 11 and 12 that the only business transacted by taxpayer in California related to the drilling for and production and sale of oil and gas in that State. The trial court made a finding [Finding XLV] that there was a connection between the California oil producing activities and the intangibles and their income. The review of such claimed connections as set forth in the Statement as to Jurisdiction (pp. 13-15), together with all the facts and inferences which appellee has mobilized, at pages 16-19 of its Motion, do not show any relationship between the intangibles and the oil and drilling activities.

A closer analysis of these alleged connections is highly revealing and most appropriate, for it is on this premise that the judgments of the lower courts were predicated and it is upon the alleged insufficiency that this appeal is based.

A. Alleged Benefits From the Joint Operation of California Properties by the Taxpayer and Pacific Western Oil Corporation.

The taxpayer had investments in stock and notes of Pacific Western Oil Corporation, a controlled subsidiary, which averaged in excess of $4,500,000 during this period. Through this subsidiary, the taxpayer controlled Mission Corporation and Skelly Oil Company, both of which were very substantial corporations.

Included in the intangible income in question are the following items of income received by the taxpayer on stock and notes of Pacific Western Oil Corporation:

Dividends	$ 808,482.60
Interest	275,865.55
Capital Gains	143,807.07
	$1,228,155.22

During this period, the taxpayer shared offices and officers with this controlled subsidiary both in Los Angeles and in New Jersey. Furthermore, the two companies joined together in their California oil operations, with each bearing its relative share of the actual costs. The only benefit the taxpayer received from these arrangements was a reduction of expense.

Appellee seeks to have this Court infer that the stock and notes of Pacific Western Oil Corporation were acquired and held for the purpose of securing this expense-sharing arrangement. Appellee has not cited any facts in the record which point to such an inference. In this connection, it should be noted that the taxpayer's entire net income, before taxes, from its California oil operations during this period was only $642,512.88 and only a minor portion of such income could be attributed to the reduction of expenses secured by these joint operations.

When contrasted with the much larger amounts of income received directly from these intangible assets, as well as the direct control of other corporations secured by this holding, it would appear utterly unreasonable to conclude that these intangible investments had any connection with taxpayer's California oil operations, which were the only activities it conducted in that state.

B. Alleged Benefits From Sales of Oil to Tide Water Associated Oil Company.

The record discloses no sales of oil by the taxpayer to Tide Water Associated Oil Company in the years 1937 and 1938. In 1939, 296,279[2] barrels were sold by the taxpayer to Tide Water, as compared with taxpayer's total production of 1,959,113 barrels. Sales were made to thirteen different companies engaged in the refining and marketing of oil; two companies purchased amounts substantially in excess of those purchased by Tide Water. Each and all of the sales of oil by taxpayer to Tide Water were on an arm's length basis. Indeed, the relationship at that time between the management of Tide Water Associated Oil Company and the management of taxpayer was one of bitterness rather than friendship. The ownership by taxpayer of Tide Water stock and the resulting proxy battles certainly did not benefit the taxpayer in disposing of oil to Tide Water.

Included in the intangible income in question are the following items of income received by the taxpayer on stock of Tide Water Associated Oil Company:

Dividends	$1,187,997.00
Capital Gains	211,865.60
Total	$1,399,862.60

Taxpayer's investment in stock of Tidewater Associated Oil Company during this period approximated $2,500,000. Considering this large investment and the high returns thereon, here again it would be unreason-

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[2]The 3,000,000 barrels stated in the Motion at page 18 is obviously incorrect. [Pltf. Ex. 22, p. 210.]

able to infer that this stock was acquired or held for the purpose of providing an outlet for a minor portion of taxpayer's oil production in one year, or that it had any connection with taxpayer's California operations.

C. The Alleged Benefits From Skelly Oil Company's Operations of Taxpayer's Mid-Continent Properties.

Prior to 1938, The Mid-Continent properties (Texas, New Mexico, Kansas, Louisiana and Illinois) of the taxpayer were operated through its own offices in Carlsbad, New Mexico, and Fort Worth, Texas. In April of that year a written contract was executed under which Skelly Oil Company undertook to operate the producing properties of the taxpayer in the Mid-Continent area. Appellee has never claimed that this agreement was unfair. Moreover, the contract itself [Pltf. Ex. 21, pp. 82-84] specifically provided for renegotiation of the provisions in the event it proved unfair to either party. The agreement, by its very terms, was subject to cancellation by either party upon sixty days notice. At that time, taxpayer's capital investment in Mid-Continent properties amounted to approximately $600,000, while its indirect interest in stock of Skelly Oil Company amounted to many millions of dollars. It is absurd to even suggest that the indirect ownership in Skelly Oil Company was acquired or held for the purpose of effecting a contract for the routine operation of oil properties in the Mid-Continent area, which in turn had no connection with the California activities.

D. The Alleged Use of Income From Intangibles to Cover Operating Expenses of California Oil Operations.

Appellee, for the first time, asserts in its Motion that the intangibles and the income therefrom were related to California oil producing activities because of two transfers of funds from New York banks to California banks.

While overall control and authority over the California oil operations were vested in and exercised by the officers and directors in New Jersey, most of the activities in California were carried on by California officers and employees. Taxpayer had an office in Los Angeles and kept bank accounts in California over which the California officers exercised supervision.

The proceeds from the oil and gas sales were deposited in the California bank accounts and were used for those purposes. There is no evidence whatsoever that any of these funds were used for the purchase of securities.

In general, the oil operations were self-sustaining despite the fact that both production and sales declined somewhat during this period. The net income, before taxes, totalled $642,512.88 for the three years and provided ample funds for working capital purposes.

Appellee suggests (Motion, p. 19) that the investment securities were held and used as a means of raising working capital for the oil operations. It states that "funds were transferred from time to time from banks in New York to take care of the expenses of carrying on the oil operations of the company in California." The record does show that $150,000 were transferred from Eastern banks to the Los Angeles bank in 1938 and $100,000 were so transferred in 1939. However, the record does not indicate in any way that the funds were transferred or

used for the purpose of paying expenses. During each of these years the California oil operations were profitable, so there was no need for additional funds to cover expenses.

Plaintiff's Exhibit No. 23, a comparative balance sheet for the three years, shows that during 1938 and 1939 the net investment in California Lands, Leases and Mineral Rights increased from $203,707.85 to $467,909.56, or by $264,202.71 and that the net investment in California Plant and Equipment increased from $639,914.69 to $768,-496.63, or by $128,581.94. It seems obvious that the funds transferred to California were used for investment in capital assets and not to defray operating expenses.

Such transfers of relatively minor amounts of capital from one business division to another certainly does not justify any conclusion that "the intangibles had acquired a business situs or were a part of or correlated with a unitary enterprise" of taxpayer in California. (See *Marshall-Wells Co. v. Commissioner,* 220 Minn. 458, 20 N. W. 2d 92, 95.)

The above analysis of the occasions where business dealings by the oil producing division of the taxpayer coincided with the investments of the company do not show any connection between the intangibles and the oil producing properties and activities. Moreover, many items in the investment portfolio, such as German Government bonds, British pounds sterling, Richfield Oil Corporation stock, Getty Realty Corporation stock and Minnehoma Oil & Gas Company stock, are not claimed to have had any relation whatsoever with the oil production division. Yet the income therefrom has been included within the franchise tax imposed and upheld. The tests applied and announced by this Court require a substantial

connection between income from intangibles and the other activities. The ultimate fact of commercial domicile in California for these intangibles is not substantiated one iota by the record.

This Court in *First Bank Stock Corp. v. Minnesota,* referring to the stock ownership of banks serviced by the taxpayer, stated:

> ". . . But it is plain that the business which appellant carries on in Minnesota, or directs from his offices maintained there, is sufficiently identified with Minnesota to establish a 'commercial domicile' there, and to give a business situs there, for purposes of taxation, to intangibles which are used in the business or are incidental to it, and have thus 'become integral parts of some local business' ". (301 U. S. 234 at 237, 81 L. Ed. 1061 at 1063, 57 S. Ct. 677.)

The record in this case, to the contrary, shows clearly that the intangibles in question were not used in the California oil business, were not incidental to it, and had not become an integral part of the local business. Quite the opposite, these intangibles were an integral part of a business located and directed from the New Jersey office and had their business situs, for purposes of taxation, in New Jersey.

V.

The Equal Protection Clause of the Fourteenth Amendment Was Raised in the Courts Below.

Appellant has consistently argued that the application of the Bank and Franchise Tax Act to the income here involved violates the prohibition imposed upon States in the Equal Protection Clause of the Fourteenth Amendment. Paragraph XV of the Complaint stated "Said

determination, assessment and collection are also contrary to the Constitution of the United States of America and particularly Article Fourteenth of the amendments thereto. . . ."

Appellant's opening brief in the trial court stated at page 84:

> "The foregoing legal discussion in treating the invalidity of the attempted tax as unconstitutional raises questions under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution and Article I, Section 13, of the California Constitution. . . ."

In its Opening Brief in the District Court of Appeal appellant asserted the Due Process Clause of the Fourteenth Amendment and directly quoted from the principles announced and listed by this Court in *International Paper Co. v. Massachusetts,* 246 U. S. 135, 62 L. Ed. 624, 38 S. Ct. 292. Moreover, in its Petition for Hearing by the Supreme Court of the State of California (p. 20), appellant asserted the limitations of the Fourteenth Amendment.

VI.
Conclusion.

The underlying principles of state taxation have been discussed often. Taxation of intangibles or their income has been said to be proper in the jurisdiction where they have a tax situs. They have a tax situs where they are used. Taxation is justified, therefore, because the taxing state is providing protection and benefits. The facts in the instant case show beyond question that California was not where these intangibles were used, or were protected or benefited. The intangibles were the integral

part of a business conducted, planned and supervised from the executive offices of the company in New Jersey. Plenary consideration of this cause will demonstrate the constitutional invalidity of the tax imposed and will settle the questions shown to be of general importance to the multitude of corporations engaged in diversified business activities.

Respectfully submitted,

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No. 99. PACIFIC WESTERN OIL CORP., SUCCESSOR IN INTEREST TO GEORGE F. GETTY, INC., *v.* FRANCHISE TAX BOARD OF CALIFORNIA. Appeal from the District Court of Appeal of California, Third Appellate District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. *Joseph D. Peeler, John P. Pollock, David W. Richmond* and *Robert N. Miller* for appellant. *Edmund G. Brown*, Attorney General of California, *James E.*

Sabine, Irving H. Perluss, Assistant Attorneys General, and *Ernest P. Goodman,* Deputy Attorney General, for appellee. Reported below: 136 Cal. App. 2d 794, 289 P. 2d 287.